Justice MaryGay Kennedy

Date filed: 02/09/23 CUMBERLAND COUNTY Docket No. AP-23-007

Action: Rule 80C Appeal

Wayne R Jortner
Richard Bennett
John Clark
Nicole Grohoski

Shenna Bellows in her official capacity as Secretary of State of the State of Maine

Vs.

Petitioner/Plaintiff's' Attorney

Peter L Murray, Esq. and
Sean Turley, Esq.
Murray Plumb & Murray
PO Box 9785
Portland, ME 04104-5085

Respondent/Defendant's Attorney

Jonathan R Bolton, AAG and
Paul E Suitter, AAG
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Date of Entry 2023	
Feb 16	Received 02/09/23. Petitioners' Rule 80C Appeal filed. Filing fee paid.
Feb 16	Received 02/09/23. Petitioners' Consented-To Motion to Expedite Filing of Administrative Record and Briefing Schedule along with proposed order filed.
Feb 16	Received 02/13/23. Entry of Appearance of John R Bolton AAG on behalf of Respondent Shenna Bellows in her official capacity as Secretary of State of the State of Maine filed.
Feb 16	Received 02/15/23. Administrative Record along with signed original certification of agency record Filed.
Feb 16	On 02/16/23. Case sent to assigned Justice John O'Neil for review of pending motion.

Feb. 25	Received 2/21/23. Petitioners' Rule 80C brief filed.
" "	On 2/22/23 File returned.
" "	Received 2/22/23. Order on Consented-to Motion to Expedite Filing of Administrative Record filed. (J. O'Neil - signed 2/22/23) The Clerk shall incorporate this Order into the docket pursuant to Maine Rules Of Civil Procedure 79(a). Copies to counsel/parties 2/25/23.
" "	On 2/22/23. Justice O'Neil recuses.
" "	On 2/25/23. Case reassigned to Justice MaryGay Kennedy.
Mar 1	On 3/1/23. Respondent Secretary of State's Rule 80C Brief filed.
Mar 6	On 3/6/23. Petitioner's Rule 80C Reply Brief filed.
Mar 6	On 3/6/23. Case file and record sent to Justice Kennedy for review.
Mar 9	On 3/9/23. Case file returned to Clerk's Office.
Mar 9	On 3/9/23. Decision signed by Justice MaryGay Kennedy. Petitioners' Appeal is GRANTED. This matter is remanded to the Secretary of State for the purpose of revising the final wording of the ballot question in a manner consistent with this decision. Copies to parties/counsel 3/9/23.

Mar 13	On 3/13/23. Respondent Shenna Bellows' Notice of Appeal filed. Date-stamped copy sent to Petitioner on 3/13/23.
Mar 13	On 3/13/23. Notice of Appeal transmitted to the Law Court with Appeal Checklist and copy of docket record.
Mar 15	On 3/15/23. Entire original file hand-delivered to the Law Court with Coversheet and Superior Court docket entries. **"LAW"**
" "	On 3/15/23. Copy of Superior Court docket entries mailed counsel/parties of record.

CONTAINS NONPUBLIC DIGITAL INFORM ON

MAINE JUDICIAL BRANCH

Wayne R. JORTNER, et al.

V.

Shenna BELLOWS, Secretary of State

"X" the court for filing:
☒ Superior Court ☐ District Court
☐ Unified Criminal Docket
County: Cumberland
Location (Town): Portland
Docket No.: AP-2023-007

NOTICE OF APPEAL
☒ CIVIL ☐ CRIMINAL

I, (*name of party appealing*), Shenna Bellows, Secretary of State appeal from the judgment, order or ruling entered in this proceeding on (*date of order appealed from - mm/dd/yyyy*) 03/09/2023. Any party who wishes to be heard on this appeal must file an appearance.

☒ This is a civil appeal.

☐ This case arises from the Maine Tort Claims Act requiring the clerk to send a copy of this Notice of Appeal to the Office of the Attorney General.

☐ If this is a criminal appeal, check one of the following:
- ☐ The defendant is presently confined at _____
- ☐ The defendant is not in custody. The defendant's address is:

_____

"X" THE APPLICABLE BOX:
- ☐ The Transcript Order form is attached.
- ☒ No transcript will be ordered.
- ☐ No electronic or other recording of the proceedings can be prepared for this civil case. Therefore, a statement in lieu of transcript will be prepared pursuant to M.R. App. P. 5(d).

Date (*mm/dd/yyyy*): 03/13/202

▶ Paul Suitter
Signature of Appellant or Appellant's Attorney

Address of Appellant or Attorney:
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Paul Suitter
Printed name of Appellant or Appellant's Attorney
If attorney, bar number: 5736

PLEASE NOTE: This Notice of Appeal must be filed in the court that issued the order appealed from. It will not be accepted or docketed unless (1) in a Civil case, it is accompanied by the required filing fee or a motion to waive the filing fee, and (2) if the appellant is represented, it contains the bar number of Appellant's attorney.

If this is an appeal from a civil case or a criminal case involving an adult defendant, this notice must be filed within 21 days of the entry of the judgment in the docket. If this is an appeal from a case involving the extradition of a fugitive to another state, this notice must be filed within 7 days of the entry of the judgment in the docket.

WARNING: Small Claims, Forcible Entry & Detainer and Juvenile matters have differing time limits for filing a Notice of Appeal. If this is an appeal from a Small Claims, Forcible Entry and Detainer or Juvenile matter, another form must be used which is available from the clerk.

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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-2023-007

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI,

Petitioners,

v.

SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine,

Respondent.

DECISION

Pursuant to M.R. Civ. P. 80C, Petitioners Wayne R. Jortner, Richard Bennett, John Clark, and Nicole Grohoski appeal the decision of Respondent Shenna Bellows, Secretary of State for the State of Maine ("the Secretary"), regarding the final wording of the ballot question on the initiative titled "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility" ("the Initiative"). For the following reasons, the Court grants Petitioners' Appeal and remands the matter to the Secretary for revision of the Ballot Question.

I. Background

On November 30, 2022, the Secretary determined that the requisite number of valid signatures were submitted for the Initiative to appear on the ballot. (R. 46-47.) On January 30, 2023, after public comment, the Secretary determined that the final wording of the ballot question on the Initiative would be as follows:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

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("the Ballot Question"). (R. 1.) In this action, Petitioners contend that the phrase "quasi-governmental power company" is not understandable to a reasonable voter and is misleading. The Secretary argues that the Ballot Question, including the phrase "quasi-governmental power company," was "carefully drafted by the Secretary to best reflect the substance of the initiative." (Resp't's Br. 1.)

The Initiative would establish the Pine Tree Power Company ("PTPC"), which would "provide for its customer-owners in this State reliable, affordable electric transmission and distribution services." (R. 40.) PTPC would have the power, under certain conditions, to acquire investor-owned transmission and distribution facilities. (R. 41-42.)

The petition for the Initiative was issued on October 22, 2021 ("the Petition"). (R. 38.) The Petition includes a "Summary of Proposed Initiative," an "Estimate of Fiscal Impact," and the language of the proposed legislation ("the Legislation"). (R. 38-45.) The Summary of Proposed Initiative describes PTPC as a "privately-operated, nonprofit, consumer-owned utility controlled by a board the majority of the members of which are elected." (R. 38.)

The Legislation, at proposed 35-A M.R.S. § 4003(1), describes PTPC as "a consumer-owned transmission and distribution utility [that] has all the powers and duties of a transmission and distribution utility under this Title, as affected by the provisions of chapter 35, within the service territories of the investor-owned transmission and distribution utilities whose utility facilities it acquires under this chapter." (R. 40.) The Legislation further states that PTPC would be a "body corporate and politic" governed by a board composed of "13 voting members, 7 of whom are elected members

and 6 of whom are designated members chosen by the elected members." (R. 40.) The phrase "quasi-governmental" does not appear in the Petition.[1] (R. 38-45.)

II. Legal Standard

The Maine Constitution grants the Maine people the right to legislate by direct initiative. Me. Const. art. IV, pt. 3, § 18. The Secretary is charged with drafting the ballot question for an initiative. Me. Const. art IV, pt. 3, § 20.

Review by the Superior Court of decisions of the Secretary of State regarding the wording of ballot questions is governed by 21-A M.R.S. § 905(2), which provides, in pertinent part:

> In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes.

The Law Court has held that § 905(2) mandates that the Superior Court "independently determine whether the ballot question is understandable and not misleading" based on the record, without deference to the Secretary's decision.[2] *Olson v. Sec'y of State*, 1997 ME 30, ¶ 4, 689 A.2d 605.

The Law Court further clarified that the issue to be reviewed is not whether the description of the subject matter is "understandable to a voter who is reading both the question and the legislation for the first time." *Id.* ¶ 11. Rather, the issue is whether voters who have educated themselves about the initiative, but "who may be reading the question for the first time in the voting booth, will understand the subject matter and the choice presented." *Id.*

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[1] Nor did "quasi-governmental" appear anywhere in the Application for Citizen Initiative. (R. 5-17.)
[2] The requirement under the Maine Constitution that the question be intelligible is subsumed in § 905. *Olson v. Sec'y of State*, 1997 ME 30, ¶ 6, 689 A.2d 605; *see* Me. Const. art. IV, pt. 3, § 20.

III. Discussion

The parties devote considerable time to debating whether "consumer-owned" or "quasi-governmental" is a more accurate descriptor of PTPC. Which one is more accurate, however, is not the question to be decided. Rather, the issue is whether the Secretary's chosen language is understandable and not misleading.

A. Understandable

The Secretary argues that a voter would understand the phrase "quasi-governmental" in the context of the Initiative because (1) the Legislation describes PTPC as a "body corporate and politic," which is language used in other legislation establishing other quasi-governmental entities; (2) the Legislation provides that the board of directors of PTPC would be elected in statewide elections; and (3) the Legislation identifies certain powers and attributes of PTPC that are similar to those of other quasi-governmental entities.

Although the description "body corporate and politic" may be a fair synonym for "quasi-governmental," the Legislation does not define "body corporate and politic." It is unreasonable to expect an average voter to draw the connection between the use of the phrase "body corporate and politic" in the Legislation and "quasi-governmental" in the Ballot Question and emerge with a clear understanding of the meaning of either phrase.

The Secretary suggests that the average voter, pursuant to *Olson*, can be expected to consult "external sources" to understand the Ballot Question, such as other statutes establishing quasi-governmental entities. The Secretary might be correct if another statute clearly defined "quasi-governmental." In *Olson*, the Law Court noted that "the term 'Class A crime' is readily understood by reference to external sources because it is defined by statute and would undoubtedly be discussed in the context of political debate

on the initiative." 1997 ME 30, ¶ 11, 689 A.2d 605. "Quasi-governmental," however, is not expressly defined elsewhere in Maine's statutes.

In other words, the Secretary suggests that the average voter should know of existing quasi-governmental entities (and the fact that they are quasi-governmental), consider the features and organization of those quasi-governmental entities, and extrapolate that the phrase "quasi-governmental" is intended to suggest that PTPC would be governed by an elected board, for example.[3] That is too large of a leap to expect a voter to make on a first reading, especially in light of the fact that PTPC is referred to as "consumer-owned" in all other relevant places.

The structure and function of PTPC are at the core of the Initiative. A ballot question which does not use understandable language to describe PTPC, therefore, inadequately describes the subject matter of the Initiative and is insufficient under § 905(2) and *Olson*.

B. Misleading

Petitioners argue that the phrase "quasi-governmental" is misleading because it suggests that PTPC would be funded by taxpayers, rather than consumers. The *Olson* Court interpreted the "misleading" component of § 905(2) as requiring the following showing: "Plaintiffs must demonstrate that the question will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes. Merely demonstrating that the question creates a misleading impression about the legislation is not enough." 1997 ME 30, ¶ 7, 689 A.2d 605. A question that makes an inaccurate suggestion about legislation is not necessarily misleading. *Id.* ¶¶ 7, 9.

[3] Moreover, if the phrase "quasi-governmental" is meant to primarily indicate, as the Secretary suggests, that PTPC will be governed by an elected board, then the remainder of the question is redundant. Thus, the remainder of the question suggests that more is meant by "quasi-governmental."

The question at issue in *Olson* read: "Should spraying pesticides from the air or putting pesticides in Maine's waters be a Class A crime?" *Id.* ¶ 3. The plaintiffs argued that the word "putting" did not comport with the initiative language, "cause, by any means, the introduction of," because it suggested that only intentional conduct would be criminalized. *Id.* ¶ 7. The Law Court held that "putting" was similar to "introduce." A reasonable voter who understood the initiative would not be misled.

The phrase "quasi-governmental," is not a synonym for "consumer-owned." The phrase "quasi-governmental" is not mentioned in the Legislation. Moreover, the Ballot Question at no point refers to consumer ownership—a core feature of the Legislation. A reasonable voter who compared the language of the Ballot Question to the language of the Legislation might be unsure whether the Ballot Question is referring to PTPC. To a voter who did not understand the meaning of "quasi-governmental," it might, in fact, appear to mean the opposite of "consumer-owned." Thus, the question creates a risk that voters will be led to vote contrary to their true intention.

IV. Conclusion

For the foregoing reasons, the Court finds that the Ballot Question does not meet the standard of 21-A M.R.S. § 905(2) and must be revised.

The entry is:

> Petitioners' Appeal is GRANTED. This matter is remanded to the Secretary of State for the purpose of revising the final wording of the ballot question in a manner consistent with this decision.

The Clerk is directed to incorporate this Decision into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: March 9, 2023

MaryGay Kennedy, Justice
Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-23-7

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI,

Petitioners,

v.

SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine,

Respondent.

PETITIONERS' RULE 80C REPLY BRIEF

Petitioners Wayne Jortner, Richard Bennett, John Clark and Nicole Grohoski (collectively "**Petitioners**") reply to the Rule 80C brief filed in the above-captioned matter by respondent Shenna Bellows, in her official capacity as Secretary of State for the State of Maine ("**Respondent**" or "**Secretary**"), as follows.

I. Introduction

The subject of this appeal is the decision dated January 30, 2023 (the "**Decision**") by the Secretary determining the final wording of the ballot question to be considered by voters when choosing whether to adopt the initiated legislation entitled "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility" (the "**Legislation**"). (R. 1–4.) The Secretary has proposed for the following language describing the Legislation to appear on the ballot (the "**Ballot Question**"):

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

(R. 1.) For the reasons set forth below and in Petitioners' brief-in-chief, the Court should vacate the Decision as violative of the exacting standard set forth in 21-A M.R.S.A. § 905(2) and modify the

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Ballot Question by replacing the phrase "quasi-governmental" with "consumer-owned" and "power company" with "transmission and distribution utility" to prevent reasonable voters reading the Ballot Question for the first time in the voting booth from not understanding the Legislation or being misled into voting against their wishes.[1]

II. Argument

A. 21-A M.R.S.A. § 905(2) imposes exacting standard of review, not a forgiving one.

Respondent concedes in her brief that the standard of review provided by 21-A M.R.S.A. § 905(2) governs the Court's adjudication of this appeal (Resp't Br. at 5); the Court's review is *de novo* and without deference to Secretary, which Respondent characterizes as "technically" accurate (Resp't Br. at 6); and the Court is obligated to "independent[ly] review . . . the Secretary's choice of language to make sure that it is 'understandable' and 'will not mislead' a 'reasonable voter,'" (Resp't Br. at 7 (quoting 21-A M.R.S.A. § 905(2)). However, the Secretary seeks to minimize the consequences of these rules of law by suggesting that they impose a "very forgiving" standard, arguing that the Secretary is vested with discretion in deciding the wording of a ballot question and implying that such discretion is relevant to the Court's consideration of this appeal.[2] (Resp't Br. at 1, 2, 6, 8.)

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[1] The parties agree that the requirements of 21-A M.R.S. § 906(6), which commands that ballot questions are drafted "concisely and intelligibly," and Article IV, Part 3, Section 20 of the Maine Constitution, which obligates the Secretary to write the question "in a clear, concise and direct manner that describes the subject matter of the …direct initiative as simply as is possible," are subsumed for the purposes of the Court's review under the standard set forth in section 905(2). Me. Const. art. IV, pt. 3, § 20; 21-A M.R.S.A. § 906(6); *see Olson v. Secretary of State,* 1997 ME 30, ¶ 6, 689 A.2d 605; Pet'rs Br. at 7–8; Resp't Br. at 6.

[2] The Secretary has characterized this discretion as "substantial" and "significant." (Resp't Br. at 6, 16.) Omitted from Respondent's Brief, though, are citations to any authority that affirmatively vests such discretion in the Secretary. Rather, Respondents cite to 21-A M.R.S.A. § 901(4), which obligates the Secretary to follow the standards set forth in 21-A M.R.S.A. § 906 when drafting ballot questions (Resp't Br. at 17); 21-A M.R.S.A. § 905(2), which authorizes the Court to consider the Secretary's proposed ballot question language pursuant to the non-deferential standard of review applicable to the case *sub judice* (Resp't Br. at 16–17); and *Olson v. Secretary of State,* 1997 ME 30, ¶ 4, 689 A.2d 605, which instructs that the Court must consider the Decision "independently" and without deference to the Secretary (Resp't Br. at 6). Contrary to Respondent's argument, Section 905(2) does not grant to the Secretary *any* authority to choose the

But what the Secretary categorizes as "discretion" is just deference by another name. As the Law Court made plain in *Olson v. Secretary of State*, the Superior Court must scrutinize the Decision "independently" and without deference to the Secretary—not based on whether the Secretary properly exercised her discretion and/or abused that discretion.[3] 1997 ME 30, ¶¶ 4–6, 689 A.2d 605 ("[T]he Superior Court . . . [is] *required* to *independently* determine whether the ballot question is understandable and not misleading." (emphasis added)). Therefore, what Respondent suggests—that the Secretary enjoys latitude in the drafting of ballot questions and the Court must not trammel on the Secretary's discretionary authority by vacating the Decision—undermines the very rules that the Petitioners and Respondents agree govern this appeal.

The conclusion that Section 905(2) imposes an exacting—not forgiving—standard of review is reinforced by the statutory scheme of which it is a part. Section 905, with its *de novo* standard of review and its special accelerated procedure before both the Superior Court and the Law Court,

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appropriate language for a ballot questions, let alone to do so through an exercise of discretion. Instead, the statute that governs the Secretary's drafting ballot questions, 21-A M.R.S.A. § 906, expressly limits her powers, including that the question be written in "a clear, concise and direct manner that describes the subject matter of the people's veto or direct initiative as simply as possible." 21-A M.R.S.A. § 906(6)(B) ("The Secretary of State *shall* write the question in a clear, concise and direct manner that describes the subject matter of the people's veto or direct initiative as simply as is possible." (emphasis added)). Those express limitations on the Secretary's authority means the Secretary does not exercise her powers discretionarily. Therefore, the Court should not be persuaded by Respondent's efforts, albethey subtle, to undermine the clear and strict standard of review that applies to this appeal.

[3] Respondent seems to imply that the result of this appeal depends on whether the Secretary abused her discretion ,which occurs when an agency "exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Apple Inc. v. State Tax Assessor*, 2021 ME 8, ¶ 40, 254 A.3d 405. But section 905(2) expressly modifies the default standard of review for appeals of agency action set by Maine Rule of Civil Procedure 80C and 5 M.R.S.A. 11007(4)(C), which requires the Court to consider whether agency violated the abuse of discretion standard. *E.g., Maquoit Bay, LLC v. Dep't of Marine Res.*, 2022 ME 19, ¶ 5, 271 A.3d 1183 ("[W]e review the underlying administrative agency decision directly for abuse of discretion, errors of law, or findings unsupported by substantial evidence in the record."); *Kroeger v. Department of Environmental Protection*, 2005 ME 50, ¶ 7, 870 A.2d 566 (instructing that the Court may overturn an agency decision when it "violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record." (citing 5 M.R.S.A. § 11007(4)(C)). Here, section 905(2) controls, which means the Court must review this matter without deference to the Secretary's decision or *any* consideration of whether her supposed exercise of discretion was reasonable. *See Olson*, 1997 ME 30, ¶ 4, 689 A.2d 605.

reflects the critical importance of the referendum process and the vital role played by the wording of ballot questions in providing citizens a fair opportunity to understand the choice before them in the voting booth. This is not the sort of case that should survive judicial scrutiny on the grounds that the Secretary got the wording of a ballot question close to correct, like, to echo Respondent's metaphor, a field goal kick that barely falls short of the uprights. Instead, the Court is obligated by section 905(2) to ensure that, in its independent opinion and without deference to the Secretary, the Ballot Question is both understandable to a reasonable voter encountering it for the first time in the voting booth and that it will not mislead a reasonable voter who understands the Legislation into voting against his or her wishes. *See* 21-A M.R.S.A. § 905(2). Whether or not the Secretary has discretion is not relevant to that analysis.

B. Respondent reads Olson *so broadly as to require the Court to affirm the Decision unless voters who are practically omniscient could not understand the Ballot Question, which is a mischaracterization of the standard of review.*

In her brief, Respondent relies heavily on the Law Court's discussion at the tail end of *Olson*—concerning the degree to which voters must exercise their civil duty by educating themselves about any initiated legislation on the ballot prior to entering the voting booth—as grounds for the Court to affirm the Decision. Respondent's interpretation of this section of *Olson* does not withstand scrutiny.

Section 905(2) expressly states that the Court must consider how the Ballot Question will be interpreted by a "reasonable voter reading the question *for the first time*." 21-A M.R.S.A. § 905(2) (emphasis added). The discussion in *Olson* concerned whether the Court should also presume that a reasonable voter has never read or considered the initiated legislation itself, a proposition the Court dismisses out of hand:

> We reject the notion that section 905 requires that the description be understandable to a voter who is reading *both* the question *and the legislation* for the first time. It is inevitable that ballot questions will reflect the ambiguities, complexities, and omissions in the legislation they describe. Voters are not to rely on the ballot question *alone* in order to understand the proposal. The procedure is designed to ensure that voters, *who may be reading the question for the first time in the voting booth*, will understand the subject

> matter and the choice presented. It is assumed that the voters have discharged their civic duty to educate themselves about the initiative.

Olson, 1997 ME 30, ¶ 11, 689 A.2d 605 (emphasis added). The reasonable interpretation of that passage in conjunction with section 905(2) is that courts should endeavor to interpret the intelligibility of a ballot question from the perspective of a reasonable voter who (a) has no familiarity with the ballot question itself but (b) has taken reasonable steps to educate themselves about "the subject matter and the choice presented," such as by consulting "external sources" that illuminate the meaning and effect of the proposed legislation. *See id.* In other words, section 905(2) protects voters who exercise their civic duty seriously and not the voter who becomes aware of the initiated legislation for the first time when reading the ballot question on election day. This is the test Petitioners believe the Ballot Question fails to pass.[4]

But Respondent advances the unreasonable position that in order to vacate the Decision, the Court must find that even voters who have exhaustively researched the Legislation would misunderstand the choice offered by the Legislation or be misled into voting against their wishes. For example, Respondent makes the following conclusory assertions in her brief as though their accuracy was self-evident:

- "No reasonable voter familiar with the citizen initiative would believe that the 'quasi-governmental power company' referenced in the ballot question refers to anything other than the 'Pine Tree Power Company' as described in the content of the initiative." (Resp't Br. at 9.)

- "Petitioners seem to ignore or overlook that the Law Court presumes reasonable voters have educated themselves about the content of the actual citizen initiative . . . . Any reasonable voter who reads the Secretary's proposed ballot question will

[4] Respondent implies throughout her brief that Petitioners believe the Decision must vacated if not "textbook perfection" or on the grounds that it does not incorporate the Petitioners' "preferred, but less accurate[,] wording" or language Petitioners think is "better." (Resp't Br. at 1, 7, 16.) That is not Petitioners' argument. Rather, Petitioners contend that the Ballot Question fails to satisfy the rigorous standard set forth in section 905(2), as interpreted by the Law Court in *Olson*, and the Court must vacate the Decision and modify the Ballot Question on those grounds. To suggest otherwise misrepresents the substance of the issues before the Court on this appeal.

understand that 'quasi-governmental power company' refers to the 'Pine Tree Power Company' as fleshed out in detail in the citizen initiative." (Resp't Br. at 10.)

- "[T]he question is whether a reasonable voter familiar with the proposed citizens' initiative will understand that the ballot question is referring to the 'Pine Tree Power Company' laid out in the legislative text of the initiative. As explained above, any reasonable voter will of course understand that to be the case." (Resp't Br. at 11).

Respondents go so far as to argue that because a handful of proponents of the Legislation who submitted comments during the Secretary's review of the Legislation potentially understood that the term "quasi-governmental" was synonymous with "consumer-owned" the Court is compelled to conclude that *all* reasonable voters will draw the same conclusion and not be confused or misled by the Ballot Question:

> The public comments on the Secretary's proposed question underscore the impossibility of such a showing. Specifically, numerous commentors and petition circulators who asked the Secretary to change "quasi-governmental power company" to "consumer owned transmission and distribution utility . . . . That these citizens knew "quasi-governmental power company" was meant to refer to what they prefer to call a "consumer owned transmission and distribution utility" confirms that reasonable voters who have discharged their civic duty to familiarize themselves with the underlying citizen initiative will not be misled into voting against their preferences.

(Resp't Br. at 13.)

There are at least three fatal flaws with Respondent's position on this point.

First, it is founded on a faulty logical premise and a misreading of *Olson.* In making its conclusory assertions regarding the knowledge the Court should presume an educated voter possesses, Respondent relies on the following syllogism:

> Major premise: *Olson* holds, as a matter of law, that no educated voter is capable of misunderstanding any key concept described or discussed in the proposed legislation.
>
> Minor premise: The term "quasi-governmental" describes key concepts described or discussed in the Legislation.
>
> Conclusion: Therefore, under *Olson*, the term "quasi-governmental" is, as a matter of law, understandable and cannot mislead an educated voter into voting contrary to his or her wishes.

However, that syllogism fails its major premise because it misstates the holding in *Olson.*

In interpreting *Olson,* Respondent fails to recognize that the dispositive factor for the Law Court was that voters had available to them an accurate definition—either in a dictionary or a statute—upon which they could rely to determine the meaning of a term used in the ballot question and the choice presented thereby. Thus, the absence of a statutory definition of "quasi-governmental" on which a reasonable voter could rely *or* a dictionary definition that accurately describes what the Legislation proposes, means that this Court should conclude that the Ballot Question violates section 905(2) because that language will not be understandable to a reasonable voter reading the Ballot Question for the first time and will not mislead voters in the exercise of their franchise.

In *Olson*, the Law Court considered whether the use of the terms "putting" and "Class A crime" in a proposed ballot question violated section 905(2) on the grounds that those terms would not be understandable to a reasonable voter. *Olson,* 1997 ME 30, ¶¶ 7, 10, 689 A.2d 605. In rejecting those arguments, the Law Court relied on the fact that the concept of "putting" is captured by the dictionary definition of a commonly-understood word, "introduction," which did appear in the ballot question, and the phrase "Class A crime" was clearly defined by statute. *Id.* ¶¶ 7–11 & n.5 (citing *Introduction*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1186 (1963); 17-A M.R.S.A. §§ 1252, 1301 (defining the term "Class A crime.")). Therefore, the Law Court concluded, neither term was sufficiently incomprehensible or misleading to violate Section 905(2) because voters had available to them the information they needed to educate themselves about the substance of the proposed legislation. *Id.* ¶¶ 9, 11.

But here there is no such statutory definition—either in the Legislation or elsewhere—to which a reasonable voter can look to for guidance, and the readily-available dictionary definition of "quasi-

governmental" describes an entity that is the *opposite* of what the Legislation proposes to create.[5] Thus, the Court cannot presume that if voters discharge their civic duty by reasonably familiarizing themselves with the Legislation, they will understand the choice they face in the voting booth and will not be misled into voting against their wishes when they read the Ballot Question for the first time. The Court should therefore find that the absence of definitions for "quasi-governmental" renders the use of that term unintelligible to reasonable voters and sufficiently misleading in violation of 21-A M.R.S.A. § 905(2).

Second, if Respondent was correct that the Court must assume that all reasonable voters will have a comprehensive understanding of the Legislation down to the smallest minutiae, then the protections provided in 21-A M.R.S.A. § 905(2), 21-A M.R.S. § 906(6), and Article IV, Part 3, Section 20 of the Maine Constitution against ballot questions that are misleadingly-worded would be superfluous; a question on the ballot could pass statutory and constitutional muster by simply prompting a voter to mark either "yes" or "no" on the proposed legislation without further guidance.

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[5] The Merriam Webster Dictionary, which the Law Court relied on in *Olson* to define a term used in the ballot question under review in that case, defines "quasi-governmental" as "supported by the government but managed privately." *Quasi-governmental*," MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/quasi-governmental (last visited March 6, 2023); *see Olson*, 1997 ME 30, ¶ 9, 689 A.2d 605 (citing *Introduction*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1186 (1963)). As explained in detail in Petitioners' brief-in-chief, "supported by the government" means that something will be *funded* by the government (i.e., taxpayers). (Pet. Br. at 14–15.) Since the Company will be financially supported ratepayers—not taxpayers—the use of "quasi-governmental" simply fails the basic test of accurately describing how the Company will in fact be funded if the Legislation is adopted. (*See* R. 22 (proposed amendment to 35-A M.R.S.A. § 3501).). The Company is also not privately managed; instead, it will be controlled by a publicly-elected board. (R. 24–25 (proposed 35-A M.R.S.A. § 4002(2)).) Thus, "quasi-governmental" implies the exact opposite of the Company—i.e., a privately-managed, publicly-funded enterprise. Respondent counters by pointing to the definition of "quasi-governmental" in Black's Law Dictionary, which defines the term as a "government-sponsored enterprise or corporation (sometimes called a government-controlled corporation)." (Resp't Br. at 11 n.3 (quoting Quasi-Governmental Agency, Black's Law Dictionary (11th ed. 2019)).) However, that definition supports Petitioners' argument—not Respondent's. The definition offered by Respondent states more expressly what the Merriam Webster definition implies—i.e., that the Company will be "government-sponsored" (i.e., funded by taxpayers) and "government-controlled" (i.e., run by the State), which is categorically not the case.

Accordingly, Section 905(2) protects not just against "bewildering double-negatives" but also against the use of terminology that (a) appears only in the ballot question (not the corresponding legislation), (b) is not understandable by the vast majority of reasonable voters,[6] and (c) has a dictionary definition directly at odds with what the concept it is purporting to describe. Deducing, as Respondent proposes, what a reasonable voter reading the Ballot Question for the first time will understand based on the knowledge possessed by a small group of people so passionate about the Legislation that its members submitted comments to the Secretary, renders the statutory protections against unintelligible and misleading ballot questions virtually impotent and minimizes the critical role Section 905(2) plays in protecting reasonable voters from such an outcome.

Third, contrary to Respondent's framing of the issues, Petitioners do not argue that the Decision must be vacated because reasonable voters will not understand that the "quasi-governmental" entity referred to in the Ballot Question is the Pine Tree Power Company (the "**Company**"). Rather, Petitioners contend that the use of the term "quasi-governmental" will cause reasonable voters to misunderstand what the Company would *do*, which is the crux of the decision facing voters in the voting booth.

Imagine a reasonable voter who has exercised her civic duty and generally familiarized herself with the Legislation. The Legislation itself classifies the Company as a "consumer-owned transmission and distribution utility" and amends 35-A M.R.S.A. § 3501(1) to include the Company as one of several "consumer-owned transmission and distribution utilit[ies]" that already exist in the State. Therefore, that voter will potentially understand, based on her review of the text of the Legislation, that she is being asked to decide which of two fundamentally different utility policies she

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[6] As explained in Petitioners brief and pointed out by the Maine People's Alliance in its comment to the Secretary, the term "quasi-governmental power company" rates as "very difficult" in terms of understandability, usually requiring more than a college education—currently possessed by about one third of Maine voters—while the term "consumer-owned" is understandable by persons who have completed high school, a category in which 90% of Maine adults over 25 find themselves. (Pet. Br. at 14; R. 209.)

supports: either that electrical transmission and distribution utilities should continue to be, for most part, "investor-owned," or that those utilities should instead become "consumer-owned." But when entering the voting booth and reading the Ballot Question for the first time, that voter will be confronted with a term ("quasi-governmental") that does not appear in the Legislation; is not defined in the Legislation *or any other statute*; and denotes an entity that is publicly-funded and privately-managed, which is the antithesis of the Company.[7] Thus, despite that voter's due diligence in discharging her civic duty and her reasonable familiarity with the text of the Legislation, there is a substantial risk that such a reasonable voter will misapprehend the nature of the decision before her (i.e., she will reasonably believe that she is being asked by the Ballot Question whether to establish a publicly-funded utility) and will be misled into voting against her wishes. This is precisely the harm Section 905(2) empowers the Court to prevent.

Ultimately, it is unrealistic to expect that voters will be able to determine for themselves from the language of the statute or the dictionary whether the entity that they would be creating deserves the characterization as "quasi-governmental." The back-and-forth of these briefs indicates what a vague and disputed term that is. Because the Ballot Question constitutes a clear violation of Section 905(2) by causing reasonable voters reading the Ballot Question for the first time on election day to misunderstand the choice they face and be misled into voting against their wishes, the Court must vacate the Decision and exercise its authority to modify the Ballot Question as proposed by Petitioners.

C. The inaccuracy of "quasi-governmental" is compounded by its emotional impact.

It is important for the Court to recognize that the problem with the term "quasi-governmental" is not just that it is misleading but also that it is likely to trigger a deeply emotional aversion many voters have to the specter of bigger government and increased taxes. "Quasi-governmental" is not

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[7] Petitioners provide a detailed overview of the use of the term "quasi-governmental" and the lack of any definition on which a reasonable voter could rely in their brief-in-chief. (Pet. Br. at 10–12.)

an innocuous term that fails the test set forth in Section 905(2) only on the grounds that it is *inaccurate*.[8] Rather, it is provocative by definition because it incorrectly describes something that is funded by taxpayers and involves the government takeover of private industry, which will be the kiss of death for many voters who would otherwise support a consumer-owned utility but will have an instinctual reaction to vote against their wishes because of the appearance of "quasi-governmental" in the Ballot Question.[9] The emotionally-charged nature of that term and its potential to mislead was pointed out by several commenters:

- "I object to the misleading wording you have proposed for the ballot initiative. It is almost as if CMP wrote it. When you say Pine Tree Power will be 'quasi-governmental' you play into the hands of CMP who is trying to tell the public that PTP will be just another bureaucratic branch of the State government." (R. 72 (William Dunn).)

- "It is clear that a lot of money and power is being wielded to negatively shape the narrative around this initiative, and it is the responsibility of a healthy democracy to convey this question to voters accurately, rather than yield to the anti-democratic influence of multi-national corporations by using misleading and unnecessary euphemisms like quasi-governmental." (R. 184 (Spencer Barton).)

- "[T]he use of the phrase 'quasi-governmental owned power company' is quite deceptive!! It is not true to the nature of the petition we signed. Plus, it feeds into the notion that PTPC can't work because it will be run by the govt. It is such a mis-representation!" (R. 185 (Susan Lubner).)

- "I would endorse other language proposed by Our Power/Maine Public Power for the Pine Tree consumer-owned company and NOT use a misleading term like 'quasi-governmental' which is not accurate. Is this language intended to negatively bias the referendum question? It seems so . . . ." (R. 0181 (Joan Mayer).)

- "Why 'quasi-governmental owner power company . . .' ? In the current political climate, saying "quasi-governmental owned" is likely to annoy people. And it does

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[8] By contrast, Petitioners and Respondent disagree about the degree to which the term "power company" accurately describes the Company given that it will be a "transmission and distribution utility." (Pet. Br. at 20–24; Resp't Br. at 13–14.) The Court's resolution of that dispute ultimately depends on its consideration of the meaning of those terms—not the emotional impact one is more likely to evoke over the other. But the use of the term "quasi-governmental" in place of "consumer-owned" raises an additional concerns for the Court to keep in mind because of how charged that language will be to voters, thereby amplifying that term's ability to confuse and mislead the electorate.

[9] *See* footnote 5.

not capture what would be the actual governance property of the power company. (R. 149 (Steve Lauder).)

It is significant that the only support in the record for use of the term "quasi-governmental" came from those interests that are opposed to the creation of the Company and are fighting to defeat the Legislation.[10] This is because the term plays on the deep distrust of governmental expansion and control that is at the core of modern political discourse without conveying to the reasonable voter the true nature of the choice the Legislation presents to them: that is, whether to (a) keep the status quo of "investor-owned" electrical utilities or (b) adopt the Legislation and create a "consumer-owned transmission and distribution utility" that will be funded by ratepayers—not taxpayers—and run by an elected board of private citizens—not the State. Language that is directly at odds with the terminology used in the Legislation and that resonates with the parade of horribles being trotted out by the Legislation's opponents will certainly sow confusion and mislead many voters to vote against their interest when confronted with the Ballot Question for the first time on election day.[11] The Court must act to ensure that the Ballot Question is understandable to reasonable

[10] Respondent's suggestion that the Company's ability to exercise eminent domain powers means it should be classified as "quasi-governmental" is a feint. (Resp't Br. at 14.) Pursuant to 35-A M.R.S.A. § 3136, the existing transmission and distribution utilities in Maine have the power to "take and hold by right of eminent domain lands and easements necessary for the proper location of its transmission lines," subject to certain conditions, exceptions and approval of the Public Utilities Commission. If the authority of the Company to exercise eminent domain is sufficient in and of itself to characterize it as "quasi-governmental," then that phrase would be particularly meaningless in the context of the Ballot Question because it would mean that the current investor-owned electrical utilities are "quasi-governmental" as well. It is quite ironic, then, that the Legislation's opponents prey on fears of eminent domain in their advertising. Maine Energy Progress, *A Government-Controlled Utility Company is a Risk Mainers Can't Afford,* https://www.maineenergyprogress.com (last visited February 20, 2023) (warning that the Legislation is a "scheme to seize Maine's electric grid by eminent domain would create a government-controlled utility" and that "we would all be on the hook for the cost").

[11] For example, the website of Versant's "Maine Energy Progress" plays on the negative associations with government seizing private industry by claiming that the Company is a "government-controlled utility company" and a "risk Mainers can't afford" while website for CMP's Maine Affordable Energy traffics in fears about "government-controlled power." Maine Energy Progress, *A Government-Controlled Utility Company is a Risk Mainers Can't Afford,* https://www.maineenergyprogress.com (last visited March 6, 2023); Maine Affordable Energy Coalition, *Our Coalition*, https://maineaffordableenergy.org/show-your-support/our-coalition/ (last visited March 6, 2023).

voters and does not cause voters to exercise their franchise based on misplaced fears about taxation and the government trammeling on private enterprise.

Petitioners recognize that if "quasi-governmental" was a fair and reasonable label for the Company, its supporters would have to accept that reality and try to address their concern about it through political messaging prior to people casting their ballots. But that is not the state of affairs. Instead, the Secretary has adopted a term absent from the Legislation that is both inaccurate and redolent with negative connotations likely to confuse and mislead reasonable voters into voting contrary to their wishes. That is why the Court must act to ensure reasonable voters are provided the opportunity to exercise their franchise in accordance with Section 905(2).

D. Election day is not the time to introduce a phrase capable of such misunderstanding and misdirection.

Since the submission of the application to put the Legislation on the ballot, the entity created by the Legislation has been uniformly identified and described as a "consumer-owned transmission and distribution utility." That phrase appears in the application (R. 5–17); on the face of the petition, which was approved by the Secretary and the Office of the Revisor of Statutes and presented to thousands of prospective voters across the state (R. 38–45); in the summary of the Legislation signed-off on by the Secretary and the Revisor (R. 34–35); and in the Legislation itself (R. 21–34). At no point prior to the drafting of the Ballot Question has "quasi-governmental" appeared in any of the aforementioned documents. Therefore, when reasonable voters encounter that term for the first time in the voting booth, they are going to be caught off guard by "quasi-governmental" and prompted to question whether they *really* understand what they are being asked to decide. That is exactly the outcome Section 905(2) is intended to guard against. Because "quasi-governmental" is inaccurate, preys on voters' unfounded fears, and is likely to mislead voters to cast a ballot against their true wishes, the Court must vacate the Decision and modify the Ballot Question to reflect the

fundamental choice voters will be asked to make in November between a "consumer-owned" or "investor-owned" transmission and distribution utility.

The justification the Secretary provides for the Decision, which is not owed deference, is that "quasi-governmental" better captured several subsidiary aspects of the Legislation, such as that the Company's board is elected by the public, it has the authority to adopt rules, and it would be subject to the Freedom of Access Act.[12] (R. 2–3; Resp't Br. at 2, 4.) In reaching this conclusion, the Secretary missed the forest for the trees. She is not incorrect that these parts of the Legislation have the trappings of government; but she has proposed terminology that arguably touches on these government-adjacent qualities at the expense of confusing and complicating the more fundamental change the Legislation proposes as to whether Maine's electrical utilities will be investor-owned or consumer-owned. The decision to trade "consumer-owned," which *is* defined in the Legislation itself and provides a clear understanding of the Legislation's substance, in favor of "quasi-governmental," which is not defined in the Legislation (or any other statute) and has a dictionary definition directly contrary to what will occur if the Legislation is enacted, is simply indefensible. Therefore, the introduction of "quasi-governmental" when voters first read the Ballot Question in the voting booth constitutes a clear violation of 21-A M.R.S.A. § 905(2) that the Court must remedy.

E. The Court has the clear power to modify the Secretary's choice of language.

Respondent's contention that if the Court finds that the language she has chosen for the Ballot Question is not understandable or misleading, it must remand this matter to the Secretary to provide her an opportunity to rewrite that language is incorrect. (*See* Resp't Br. at 16–17.) The statutory provision which governs this appeal, 21-A M.R.S.A. § 905(2), specifically provides that "except as modified by this section," the appeal "must be conducted in accordance with the Maine Rules of

[12] The Company will also pay property tax and will be operated by a private contractor. (R. 26 (proposed 35-A M.R.S.A. § 4003(3)); R. 31 (proposed 35 M.R.S.A. § 4008).) Neither of those aspects of the Company are at all typical of a governmental entity, further undermining the Secretary's position that the term "quasi-governmental" captures the Company's organization and function.

Civil Procedure, Rule 80C," which in turn states that "[t]he manner and scope of review of final agency action or the failure or refusal to act shall be as provided by" the Administrative Procedures Act, specifically "5 M.R.S.A. §11007(2) through §11007(4)." 21-A M.R.S.A. § 905(2); M. R. Civ. P. 80C(c). Section 11007(4) specifically and clearly sets forth the powers the Court possesses when it reviews agency action:

> **4. Decision.** The Court may: . . .
>
> C. Reverse *or modify the decision* if the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by bias or error of law;
> (5) Unsupported by substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion

5 M.R.S.A. § 11007(4) (emphasis added).

Through their appeal, Petitioners submit that the decision of the Secretary to choose the term "quasi-governmental" to describe the Company in the Ballot Question violates Article IV, Part 3, Section 20 of the Maine Constitution and the provisions of Title 21-A Section 906(6) of the Maine Revised Statutes, both of which are subsumed by 21-A M.R.S.A. § 905(2). Therefore, it is within the Court's remit to modify the Decision to comply with the requirements of those constitutional and statutory provisions as interpreted by the Law Court.

III. Conclusion

For the reasons set forth herein and in Petitioners' brief-in-chief, Petitioners respectfully request that the Court (a) vacate the Decision on the grounds that the Secretary's formulation of the Ballot Question violates 21-A M.R.S.A. § 905(2) and (b) modify the Ballot Question by replacing "quasi-governmental power company" with the term "consumer-owned transmission and distribution utility."

Dated: March 6, 2023

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SUPERIOR COURT
DOCKET NO. AP-23-07

WAYNE R. JORTNER, et al.

Petitioners

v.

SHENNA BELLOWS, in her official capacity of Secretary of State for the State of Maine

Respondent.

RESPONDENT SECRETARY OF STATE'S RULE 80C BRIEF

In this 80C action, Petitioners Wayne Jortner, Richard Bennett, John Clark, and Nicole Grohoski (collectively "Petitioners") are challenging Secretary of State Shenna Bellows's ("the Secretary") choice of language in drafting a ballot question for a citizen initiative. Petitioners have asked the Court to strike a specific phrase from the ballot question—a phrase carefully drafted by the Secretary to best reflect the substance of the initiative—and replace it with their preferred, but less-accurate wording.

Even if Petitioners were not proposing language that is less reflective of the citizen initiative's substance, they cannot prevail because the outcome is entirely dictated by the application of the Court's standard of review. The Maine Constitution has delegated the power to draft ballot questions for citizen initiatives to the Secretary, not the applicants for a citizen initiative. So long as the language selected by the Secretary "is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes"—a very forgiving standard in the eyes of the Law Court—the Secretary's choice of language must be upheld.

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In this specific case, as described further below, the Secretary drafted a ballot question that not only comports with the Law Court's forgiving standard of review, but is superior to the alternative language Petitioners have asked this Court to substitute in its place.

FACTUAL BACKGROUND

On August 13, 2021, Petitioners filed a citizen initiative application with the Secretary entitled "An Act to Create the Pine Tree Power Company, a Not-for-Profit Utility to Deliver Lower Rates, Reliability and Local Control for Maine Energy Independence." R. at 5-17. If enacted, the citizen initiative would create a "body corporate and politic" for the purpose of electricity transmission and distribution. The new utility would be governed by a board of directors would consist of a majority of members elected by the voters of Maine.[1] *Id.* at 38. The utility would have the authority to adopt rules having the force of law under the Maine Administrative Procedure Act and company records and proceedings would be subject to Maine's Freedom of Access Act. *Id.* Most significant, the initiative establishes a process by which the utility is to purchase the Maine-based transmission and distribution assets of Maine's two large investor-owned utilities, Central Maine Power and Versant. *Id.*

On September 24, 2021, the language of the initiated bill was finalized and accepted by the initiative's lead petitioner, Wayne Jortner, who also appears as a Petitioner in this 80C action. *Id.* at 18-37. The petition form for the initiative was issued on October 22, 2021, with an 18-month expiration date set for April 22, 2023. *Id.* at 38. The initiative's supporters turned in petitions supporting the measure within approximately 12 months, and the Secretary determined on

[1] Although the title of the legislation refers to a "not-for-profit utility" and Petitioners imply that the utility would be categorized as a "nonprofit," *see, e.g.*, Pet. Br. at 4, the utility does not qualify as a non-profit under Maine law. Non-profits are defined under Maine law at 13-B M.R.S.A. § 102 and specifically exclude "body politic and corporate" from the definition. Conversely, the citizen initiative states that the utility will constitute a "body corporate and politic." *See* R. at 24.

November 30, 2022, that a requisite number of valid signatures were submitted for the initiative to be sent to Maine's voters. *Id.* at 46-47.

On December 21, 2022, the Secretary issued a press release announcing 1) the proposed ballot question to appear on the November 7, 2023 general election ballot; and 2) that the Secretary was soliciting public comments on the wording of the citizen initiative, which would be accepted via an online form, email, mail, or in-person through January 20, 2023. *Id.* at 48-49. The draft language that the Secretary chose for the ballot question read:

> Do you want to create a new quasi-governmental owned power company governed by an elected board to acquire and operate existing electricity transmission and distribution facilities in Maine?

Id. at 48. All in all, the Secretary received just under 200 comments supporting or critiquing various words she chose for the ballot question, many of which also suggested alternative language for the question. *Id.* at 50-255.

Ten days after the comment period ended, on January 30, 2023, the Secretary issued to the lead petitioner her final determination and explanation of the language to be used for the citizen initiative's ballot question. *Id.* at 1-4. The final language selected by the Secretary is similar, but not identical, to the draft language set for public comment, reading:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

Id. at 1.

In great detail, the Secretary's explanation described why she chose certain language for the ballot question, including the terms "quasi-governmental" and "for-profit," as well as why she did not include certain terms such as "consumer owned," "non-profit," "reliable, affordable energy," and "foreign owned." *Id.* at 1-4.

For example, regarding the term "quasi-governmental,"—a phrase addressed by many commentors—the Secretary stated that:

> Commenters were split on whether the entity to be created by the initiated bill can or should be described as "quasi-governmental." Proponents of phrases such as "consumer owned" or "nonprofit" pointed out that those terms are used in the proposed legislation and current law. Proponents of "quasi-governmental" argued that it better reflected nature of the proposed entity. After considering these arguments, I conclude that "quasi-governmental" is the descriptor that will enable voters to best understand the choice presented by the initiative. The new entity is defined in the Act as a "body corporate and politic," a phrase used in the Maine Revised Statutes in establishing other quasi-governmental entities. It would be classified within Title 5, § 12004-G, which lists "general government" entities. The new entity would be permitted to borrow under provisions applicable to quasi-municipal entities. A majority of the board of directors are elected in statewide elections governed by Title 21-A of the Maine Revised Statutes, with candidates eligible to seek Maine Clean Election Act funds. The entity will be subject to the Freedom of Access Act and may adopt regulations having the force of law under the Maine Administrative Procedure Act. All of the above factors indicate that the entity is properly understood as "governmental" in nature. Moreover, because the entity will function as an enterprise, with its day-to-day operations conducted by a nongovernmental entity contracted by the board, it is appropriate to characterize it as "quasi" governmental.

Id. at 2.

Similarly, she explained why "consumer owned"—a phrase used in the text of the proposed legislation and supported by a number of commentors—was not the best choice for language in the ballot question:

> I recognize that "consumer owned" is a phrase that is used in current statute and that the initiative would amend the definition of that phrase to include the new entity. *See* 35-A M.R.S. § 3501. Although I accept that the phrase would become an accurate descriptor of the entity as a legal matter should the initiative be enacted by definition, I am concerned that the phrase would nevertheless suggest to voters that consumers would be acquiring shares or some other formal ownership stake in the new entity. Because "quasi-governmental" is an accurate descriptor with no such potentially misleading connotations, I have concluded it is preferable to "consumer owned."

Id.

Likewise, the Secretary provided explanations for why she did not think it was necessary or appropriate for the ballot question to provide additional details regarding costs or logistics of how the new power company would operate. *Id.* at 4. The Secretary confirmed that she was upholding her twin obligations of selecting language that is 1) accurate; but also 2) constructed as simply as possible. *Id.* Finally, the Secretary acknowledged that in addition to the specific comments addressed in her written explanation, she considered all other comments submitted during the comment period and determined that none warranted changes to the wording of the ballot question. *Id.*

On February 9, 2023, Petitioners initiated this 80C action, challenging the Secretary's choice of wording for the ballot question and asking the Court to modify the question to Petitioner's preferred language. Pet. For Rev. at 8.

STANDARD OF REVIEW

The standard of review is critical for both properly analyzing the substance and determining the outcome of this challenge.

The Secretary agrees with Petitioners that section 905(2) of Title 21-A provides the statutory standard of review for a Rule 80C challenge to the language for a ballot question related to a citizen initiative:

> In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes.

21-A M.R.S.A. § 905(2). She further agrees that *Olson v. Secretary of State*, 1997 ME 30, 689 A.2d 605 is the seminal Law Court decision construing this language. *See* Pet. Br. at 7-8. The Secretary also concurs that *Olson* clarified that the Constitutional requirement that the question be presented "concisely and intelligibly" and the additional statutory requirement that the language

be drafted "in a clear, concise and direct manner that describes the subject matter of the" initiative "as simply as possible" are both subsumed by the language quoted above in 21-A M.R.S.A. § 905(2). *See* Pet. Br. at 8 (quoting Me. Const. art. IV, pt. 3, § 20 & 30-A M.R.S.A. §906(6)).

As Petitioners point out, this Court enjoys *de novo* review of whether the ballot language is understandable to a reasonable voter and not misleading. *See Id.* (citing *Olson*, 1997 ME 30, ¶ 4, 689 A.2d 605). And technically Petitioners are correct that this Court owes no formal deference to the words chosen by the Secretary. *Id.*

But Petitioners fail to point out that even though the Secretary is entitled to no formal deference, she does enjoy substantial discretion as to which words she chooses for the ballot question. Although the Secretary consistently endeavors to do so—and in fact has successfully done so regarding this ballot question—she need not choose the best or ideal language for the ballot question to comport with her statutory and constitutional obligations. Rather, the Secretary's choice of words must be upheld so long as she has selected language that is "understandable" and "will not mislead" reasonable voters. *Olson*, 1997 ME 30, ¶ 6, 689 A.2d 605. To use a football analogy, in order to pass muster the Secretary is not required to kick the ball perfectly centered through the uprights, so long as it passes somewhere between them.

As the Law Court has pointed out, the standard for whether a ballot question is "understandable to a reasonable voter" does not require that the question convey to voters every complexity or nuance of the proposed citizen initiative. Instead,

> [t]he procedure is designed to ensure that voters, who may be reading the question for the first time in the voting booth, will understand the subject matter and the choice presented. It is assumed that the voters have discharged their civic duty to educate themselves about the initiative.

Id. ¶ 11 (emphasis added); *see also Casinos No! v. Gwadosky*, No. AP-03-16, 2003 WL 21018862, at *2 (Me. Super. Ct. Apr. 4, 2003). In fact, the Law Court has explicitly "reject[ed] the notion

that section 905 requires that the description be understandable to a voter who is reading both the question and the legislation for the first time." *Id.* (emphasis added). Instead, the question is to be reviewed for whether it is understandable to a reasonable voter who accesses "external sources" and is familiar with the "context of political debate on the initiative." *Id.*

The Law Court has concluded that the Secretary enjoys similarly broad—if not even broader—latitude in confirming that the question "will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R.S.A. § 905(2). The Law Court has cautioned that Petitioners can only win on this point if they "demonstrate that the question will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes. Merely demonstrating that the question creates a misleading impression about the legislation is not enough." *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605 (emphasis added); *see also Casinos No!*, 2003 WL 21018862, at *2.

To put it simply, the Court must conduct an independent review of the Secretary's choice of language to make sure that it is "understandable" and "will not mislead" a "reasonable voter." But in applying its independent review, the Court starts with the presumption that reasonable voters 1) have already discharged their civic duty to educate themselves about the underlying citizen initiative; and 2) are aware of the ongoing political debate regarding the citizen initiative. Only if the Secretary's question cannot be understood by such an informed voter as described above—or if it would lead such a voter familiar with the initiative's subject matter to vote incorrectly—should the ballot question be rejected.

ARGUMENT

Any suggestion that the Secretary could have used "better" language in her choice of wording for the ballot question is not only inaccurate, but irrelevant. To prevail, Petitioners would

need to demonstrate either that the ballot language selected by the Secretary would not be 1) understandable to a reasonable voter reading the question for the first time; or 2) that it could mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes. They cannot do so.

I. The Phrase "Quasi-Governmental Power Company" Is Understandable to a Reasonable Voter Reading the Question for the First Time

For a voter already familiar with the underlying citizen initiative, there simply is no aspect of the phrase "quasi-governmental power company" that could render the ballot question unintelligible. As outlined above, the Court must determine whether reasonable voters—that is, voters who have already discharged their civic duties to educate themselves about the citizen initiative by engaging external sources and the ongoing political debate—can understand what the ballot question is asking. As the Law Court has stated, "[i]t is inevitable that ballot questions will reflect the ambiguities, complexities, and omissions in the legislation they describe. Voters are not to rely on the ballot question alone in order to understand the proposal." *Olson*, 1997 ME 30, ¶11, 689 A.2d 605 (emphasis added). That said, in this circumstance the Secretary's choice of language is the best descriptor for what voters are being asked to decide—whether voters have chosen to familiarize themselves with the substance of the citizen initiative or not.

A. No reasonable voter familiar with the citizen initiative would find the phrase "quasi-governmental power company" to be unintelligible.

Far from being unintelligible, the Secretary explained in her final agency action why the use of the phrase "quasi-governmental" is the best descriptor for the utility that would be created by the citizen initiative: "[t]he new entity is defined in the Act as a 'body corporate and politic,' a phrase used in the Maine Revised Statutes in establishing other quasi-governmental entities." R. at 2. Further, the utility's board would be classified within Title 5, § 120004-G of the Maine

Revised Statutes, alongside other "general government entities." *Id.* Moreover, the utility would be permitted to borrow under provisions applicable to quasi-municipal entities. *Id.* And a "majority of its board of directors would be elected in statewide elections governed by Title 21-A of the Maine Revised Statutes, with candidates eligible to seek Maine Clean Election Act funds." *Id.* Additional "governmental" features include the fact that the utility "will be subject to the Freedom of Access Act and may adopt regulations having the force of law under the Maine Administrative Procedure Act."[2] *Id.* At the same time, the utility retains some features of a private enterprise, specifically that its "day-to-day operations [would be] conducted by a nongovernmental entity contracted by the board [of directors]." *Id.*

No reasonable voter familiar with the citizen initiative would believe that the "quasi-governmental power company" referenced in the ballot question refers to anything other than the "Pine Tree Power Company" as described in the content of the initiative.

B. Petitioners' assertion that the phrase "quasi-governmental power company" cannot be understood by a reasonable voter familiar with the citizen initiative does not pass the smell-test.

Petitioners imply that because there is no statutory definition of "quasi-governmental," a voter already familiar with the citizen initiative would not be able to understand it. *See* Pet. Br. at 10-12. But statutory definitions are merely one of the many "external sources" the Law Court assumes that civically responsible voters who have educated themselves regarding the proposed initiative will consult. The fact that the concept of a "quasi-governmental" body already exists in

[2] Petitioners state in their brief that "the Company is not at all 'governmental' in that sense. It does not have the power to enact rules or regulations." Pet. Br. at 18. But that is simply not accurate. *See* R. at 30 ("Rules. The company may adopt rules pursuant to Title 5, chapter 375, subchapter 2-A for establishing and administering the company and carrying out its duties. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.").

the Maine Revised Statutes, *see* R. 1; *see also, e.g.*, 38 M.R.S.A. § 424-C, even if not specifically defined, bolsters the Secretary's position, not Petitioners'.

Petitioners further suggest that "quasi-governmental" could cause a voter to envision any number of a wide array of entities that are different from the utility at issue in the citizen initiative, such as an entity that resembles a tenant's association, an entity similar to a turnpike authority, an entity more akin to a housing authority, or an entity that functions more like a public university. Pet. Br. at 11. True, the term "quasi-governmental" in complete isolation with no other context could conjure any of these entities, as each shares some features of government—many of which are also shared by the proposed utility—and some features of a private enterprise. But a reasonable voter is not casting a ballot in the abstract or encountering the term "quasi-governmental" in isolation. In their argument, Petitioners seem to ignore or overlook that the Law Court presumes reasonable voters have educated themselves about the content of the actual citizen initiative. *See Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 ("We reject the notion that section 905 requires that the description be understandable to a voter who is reading both the question and the legislation for the first time.") Any reasonable voter who reads the Secretary's proposed ballot question will understand that "quasi-governmental power company" refers to the "Pine Tree Power Company" as fleshed out in detail in the citizen initiative.

Petitioners also assert that voters' lack of familiarity with the term "quasi-governmental power company" renders it unintelligible. Pet. Br. at 12-14. Again, Petitioners confuse the standard for which the ballot question must be reviewed. The question is not whether a voter lacking any context will know what a "quasi-governmental power company" is in the abstract. Rather, the question is whether a reasonable voter familiar with the proposed citizens' initiative will understand that the ballot question is referring to the "Pine Tree Power Company" laid out in

the legislative text of the initiative. As explained above, any reasonable voter will of course understand that to be the case.

Nor do dictionary definitions do the Petitioners any good. Petitioners claim that the definition provided by Merriam Webster's Online Dictionary is the opposite of the utility at issue in the citizen initiative, because that dictionary defines the term "quasi-governmental" as "supported by the government but managed privately." Pet. Br. at 14-15. Petitioners then erroneously presume that "supported by the government" must mean "financially" supported by the government. Because the initiative creates a utility whose day-to-day operations are managed privately but are overseen by a publicly elected board, even a reasonable voter solely relying upon the Merriam-Webster definition would have no trouble understanding that the phrase "quasi-governmental power company" refers to the "Pine Tree Power Company" established in the initiative, much less a reasonable voter consulting other outside sources and steeped in the political debate regarding the initiative.[3]

II. The Phrase "Quasi-Governmental Power Company" Will Not Mislead Reasonable Voters Who Properly Understand the Proposed Legislation into Voting Contrary to Their Wishes

For Petitioners to succeed on the second prong of the *Olson* test, they must demonstrate that the Secretary's choice of words "will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes." *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605; *see also Casinos No!* 2003 WL 21018862, at *2. Such misdirection might occur through the use of

[3] Nor should Merriam Webster be assumed as the only source of definitions a reasonable voter would consider. As just one example, Black's Law Dictionary defines quasi-governmental agency as "A government-sponsored enterprise or corporation (sometimes called a government-controlled corporation), such as the Federal National Mortgage Corporation." *Quasi-Governmental Agency*, Black's Law Dictionary (11th ed. 2019), *available at Westlaw*. Reasonable voters consulting outside sources would have no trouble identifying the "quasi-governmental power company" as the "Pine Tree Power Company" described in the initiative.

bewildering double-negatives or other confusing language that would cause even reasonable voters—already familiar with the substance of the citizens' initiative—not to know whether to check "yes" or "no" on their ballot. But the Law Court has made one thing plainly clear: "Merely demonstrating that the question creates a misleading impression about the legislation is not enough." *Id.* (emphasis added). At best, even if Petitioners' arguments regarding the Secretary's chosen language were persuasive—which they are not—they only amount to an argument that the ballot question creates a misleading impression about the citizen initiative, not the steeper threshold that requires they demonstrate the language could cause informed voters to make a selection opposite their true preference.

A. Use of the phrase quasi-governmental power company in the ballot question will not cause reasonable voters to cast a ballot opposite their preference.

As the Secretary stated in her determination and explanation of the final agency action, "'quasi-governmental' is the descriptor that will enable voters to best understand the choice presented by the initiative." R. at 2. But even if reasonable minds can disagree as to whether "quasi-governmental power company" is the best descriptor, no reasonable voters familiar with the underlying citizen initiative would cast a ballot opposite their preference due to the Secretary's use of the phrase "quasi-governmental power company" in the ballot question.

Again, *Olson* is instructive. In *Olson*, plaintiffs challenged the Secretary of State's choice of ballot language related to an initiative seeking to criminalize the introduction of pesticides into Maine's atmosphere or waters. 1997 ME 30, ¶ 3, 689 A.2d 605. Specifically, plaintiffs argued that the Secretary of State's use of the word "putting" could mislead voters into thinking that the law would penalize only intentional conduct, rather than both intentional and accidental conduct as intended. But because "[m]erely demonstrating that the question creates a misleading impression about the legislation is not enough," the Law Court approved the Secretary of State's choice of

words. *Id.* ¶¶ 7-9. Moreover, the Law Court noted that "a reasonable voter who underst[ood] that the initiative contain[ed] no express statement on this point [would] not be misled by a ballot question that reflects the same omission."

Here, "quasi-governmental power company" is, for the reasons described above, the most accurate and informative way to describe the new public body to be created by the initiative. But even if the Court were to disagree, that would not be sufficient to grant relief. Rather, the petitioners would need to show that use of the phrase "quasi-governmental power company" would mislead a reasonable voter familiar with the substance of the underlying citizen initiative to vote opposite the voter's preference.

The public comments on the Secretary's proposed question underscore the impossibility of such a showing. Specifically, numerous commentors and petition circulators who asked the Secretary to change "quasi-governmental power company" to "consumer owned transmission and distribution utility." *See, e.g.*, Pet. Br. at 5-6, 21-2. That these citizens knew "quasi-governmental power company" was meant to refer to what they prefer to call a "consumer owned transmission and distribution utility" confirms that reasonable voters who have discharged their civic duty to familiarize themselves with the underlying citizen initiative will not be misled into voting against their preferences.

B. Petitioners mischaracterize the proper standard of review in their assertions that the Secretary's choice of language could mislead reasonable voters.

Petitioners offer three more theories as to how "quasi-governmental power company" could mislead reasonable voters. First, they believe the words "power company" may suggest that the new utility would be a "seller of power" rather than a "transmission and distribution utility. *See* Pet. Br. at 15-16. Second, they argue that the language "gives the misleading impression that the Company will be an organ of government that is taxpayer-supported." *Id.* at 16-18. And finally,

they complain that the Secretary's language "misleads voters into thinking the Company will be run by the government." *Id.* at 18-20.

Even if these arguments were relevant to the question before the court, none have merit. A "power company," in common parlance, is not limited to entities that generate power. After all, the citizen initiative creates the "Pine Tree Power Company," not the "Pine Tree Transmission and Distribution Company."[4] Moreover, while the Pine Tree Power Company may not be taxpayer supported, it will most certainly be a governmental body by any reasonable definition. Specifically, it will be run by state officials elected by Maine voters (regardless of whether those voters are customers of the company) and those officials' appointees. And, if that were not enough, the new company will have the authority to adopt rules having the force of law, *see* R. at 8, the power to exercise eminent domain, *see* R. at 11, and will be subject to the Freedom of Access Act, *see* R. at 15, a law that applies only to records relating to the "transaction of public or governmental business." *See* 1 M.R.S. § 402(3).

In any event, none of these theories would affect voters assumed to "have discharged their civic duty to educate themselves around the initiative." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605. Because "[m]erely demonstrating that the question creates a misleading impression about the legislation is not enough," these arguments should be set aside. *Id.* ¶ 7. "Despite the variation in language, a reasonable voter who understands that the initiative contains no express statement[s] on [these] point[s] will not be misled by a ballot question that reflects the same omission." *Id.* ¶ 9.

[4] Petitioners' objection to the words "power company" is particularly puzzling, as three out of the four Petitioners submitted comments to the Secretary during the public comment period urging her to adopt a ballot question that included the term "power company," while the final Petitioner submitted no comments at all. *See R.* at 143, 221, 254.

III. Petitioners' Preferred Ballot Language Is a Red Herring

Petitioners spend a great deal of real estate arguing why they believe the phrase "consumer owned transmission and distribution utility" is superior to "quasi-governmental power company." *See, e.g.*, Pet. Br. at 20-24. Although one would not glean this from reading Petitioners' opening brief, the Secretary issued a detailed explanation in the record as to why that is not the case, noting among other things that the new utility does not fit the statutory definition of "consumer owned" and will only do so in the future if the Maine Revised Statues is successfully amended by the passage of the citizen initiative. *See supra* at 4; *see also* R. at 2. In addition, the Secretary noted her reasonable concern that voters might be misguided by the phrase "consumer owned" into believing they would acquire some sort of formal ownership stake in the Pine Tree Power Company, while the phrase "quasi-governmental" is susceptible to no similar misleading impressions.[5] *Id.*

But even that is beside the point, because the Court's review is not whether better or more favorable language could or should have been selected by the Secretary. The only task for the Court is to "determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to her wishes." *Olson*, 1997 ME 30, ¶ 10, 689 A.2d 605.

Petitioners are asking the Court to force the Secretary to adopt what they view as the ideal choice of wording for the ballot question. But as analogized above, the Court's role is not to review

[5] Petitioners also imply that their preferred language would be understood by 90% of Maine voters over the age of 25, when the Secretary's will not. *See* Pet. Br. at 14. While it is not at all the Court's role to compare and decide between the Secretary's wording of the ballot question and an alternative proposed by Petitioners, it should be noted that there is no evidence that Petitioners' preferred language is more readable than the Secretary's, as the question tested in the poll to which Petitioners allude was entirely different from their preferred wording. *See* R. at 209-10.

whether the Secretary's "kick" is textbook perfection—even if that is what she achieved. Instead, the Court need only confirm the "football" has passed somewhere between the uprights. In this case, there can be no doubt that it has.

IV. If the Court Finds that the Secretary's Choice of Language Would Not Be Understandable to a Reasonable Voter or Would Be Misleading, the Appropriate Remedy Is Reversal, Not Adoption of Petitioners' Preferred Language

Petitioners have asked the Court to set aside the ballot question as constructed by the Secretary and to instead adopt their preferred wording. *See* Pet. Br. at 24. As set forth above, the Court should affirm the Secretary's construction of the ballot question for the citizen initiative. However, if the Court disagrees, the appropriate remedy is not to replace the Secretary's choice of language with Petitioners'. Instead, the appropriate remedy would be to reverse the Secretary's decision and send the question back to her so that she may draft a new ballot question not inconsistent with the Court's decision to strike down the original question.

The Court's review is governed by 21-A M.R.S.A. § 905(2), which states that the "action must be conducted in accordance with Maine Rules of Civil Procedure, Rule 80C, except as modified by this section." The relevant portion of Rule 80C—which is not modified by 21-A M.R.S.A. § 905(2)—states the "manner and scope of review of final agency action . . . shall be as provided by 5 M.R.S.A. § 11007(2) through § 11007(4).

Under 5 M.R.S.A. § 11007(4), a Court may 1) "affirm the decision of the agency," 2) "remand the case for further proceedings," or 3) "reverse or modify the decision if the administrative findings, inferences, conclusions or decisions" violate a number of tenets of the Maine Administrative Procedure Act.

As described above, 21-A M.R.S.A. § 905(2) grants the Secretary significant discretion to draft a ballot question that "is understandable to a reasonable voter reading the question for the

first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." Moreover, the Constitution delegates to the Secretary—not the judicial branch—the responsibility to draft ballot questions. Me. Const., art. IV, pt. 3, § 20. If the Court determines that the Secretary's question is inconsistent with § 905(2)—which, to be clear, it is not—the Court should vacate and remand the Secretary's determination with instructions to draft a new question that avoids whatever shortcomings the Court identifies.

There is simply no reason the Secretary should be denied the opportunity to execute the duties delegated to her by the Maine Legislature in 21-A M.R.S.A. § 901(4): "The ballot question for an initiative . . . must be drafted by the Secretary of State in accordance with section 906 and rules adopted in accordance with the Maine Administrative Procedure Act." (emphasis added).

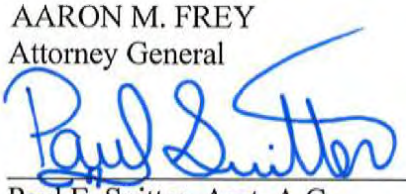
CONCLUSION

The Secretary respectfully asks that the Court affirm the ballot question language drafted by the Secretary as set forth in the final agency action.

DATED: February 28, 2023

Respectfully submitted,

AARON M. FREY
Attorney General



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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-2023-007

RICHARD BENNETT, JOHN CLARK, NICOLE GRAHOSKI, and WAYNE JORTNER,

Petitioners,

v.

SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine,

Respondent.

ORDER ON CONSENTED-TO MOTION TO EXPEDITE FILING OF ADMINISTRATIVE RECORD AND BRIEFING SCHEDULE

Upon consideration of the motion, with the consent of counsel for Respondent, and for good cause shown, Petitioners' *Consented-To Motion to Expedite Filing of Administrative Record and Briefing Schedule* is hereby **GRANTED**.

It is **ORDERED** that the above-captioned action will proceed according to the following expedited schedule:

1. Respondent will file the administrative record by **February 15, 2023**.
2. Petitioners will file their brief by **February 28, 2023.**
3. Respondent will file her brief by **March 3, 2023.**
4. Petitioners will file their reply by **March 10, 2023.**

The Clerk shall incorporate this Order into the docket pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 2/22/23

Justice, Superior Court

Entered on the Docket: 2/25/2023

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STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
DOCKET NO. AP-23- 07

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI, Petitioners, v. SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine, Respondent.	**PETITIONERS' RULE 80C BRIEF**

Petitioners Wayne R. Jortner, Richard Bennett, John Clark, and Nicole Grohoski (collectively "**Petitioners**") have petitioned this Court pursuant to 21-A M.R.S. §905(2) and M.R.Civ.P. 80C to review and modify the January 30, 2023 decision (the "**Decision**") of Maine Secretary of State Shenna Bellows (the "**Secretary**") determining the final wording of the ballot question to be submitted to the Maine voters on the initiated legislation entitled "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility" (the "**Legislation**"). In her Decision, the Secretary proposed the following wording for the question concerning the Pine Tree Power Company (the "**Company**") to appear on the November 7, 2023 ballot (the "**Ballot Question**"):

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

For the reasons set forth in greater detail below, the Secretary's use of the term "quasi-governmental power company" in the Ballot Question to describe the consumer-owned transmission and distribution utility to be formed by the Legislation violates the requirements of 21-A M.R.S. § 906(6) (which instructs the Secretary to draft the Ballot Question in a "clear,

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concise and direct manner") and Article IV, Part 3, Section 20 of the Maine Constitution (which commands that ballot questions must present "the question . . concisely and intelligibly") because that term is not "understandable to a reasonable voter reading the question for the first time" and is likely to "mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R. S. §905(2). Petitioners request that the Court vacate the Decision and modify the Ballot Question to read:

> Do you want to create a new "consumer-owned transmission and distribution utility" governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

BACKGROUND

This ballot-language dispute is the latest chapter in a long saga. For some years now Maine electricity consumers have been mounting a movement to replace Maine's two large investor-owned electric utilities with a single consumer-owned transmission and distribution utility. Following a gubernatorial veto of legislation passed by the Maine Senate and House of Representatives,[1] six Maine citizens who had been associated with that movement applied to the Secretary for a citizen initiative to establish the Company as a consumer-owned transmission and distribution utility that, under certain conditions, could purchase the assets of the investor-owned utilities and render service to Maine consumers.

On August 13, 2021, Petitioners filed with the Secretary an application proposing the adoption by citizen initiative of "An Act to Create the Pine Tree Power Company, a Not-for-Profit Utility to Deliver Lower Rates, Reliability and Local Control for Maine Energy Independence" (the "**Application**"). (R. 0005–0017.) Attached to the Application was the initial draft for the Legislation, which proposed several amendments to Title 35-A of the Maine Revised Statutes, including the creation of Chapter 40 of that Title. (R. 0006–0017.) The

[1] L.D. 1708 (130th Legis. 2021).

Application describes the entity to be created and the process by which it would potentially take over the transmission and distribution service currently being rendered by Central Maine Power Co. and Versant Power Co. in the State of Maine. (R. 0006–0017.)

The statutory language proposed by the Application defines the Company as a "consumer-owned transmission and distribution utility" by amending the list of "consumer-owned transmission and distribution utilities" in 35-A M.R.S § 3501(1) to include the Company. (R 0007.) That definition is reinforced by the proposed 35-A M.R.S § 4003, which describes the Company as follows:

> The company is a consumer-owned transmission and distribution utility and has all the powers and duties of a transmission and distribution utility under this Title, as affected by the provisions of chapter 35, within the service territories of the investor-owned transmission and distribution facilities whose facilities it acquires under this chapter.

(R 0010.)

The following sections of the proposed Legislation make clear that the financial risks and rewards of ownership accrue only to the customers of the new utility, and not to the State or the taxpayer: "rates and all other charges of the company must be sufficient to pay in full the cost of service, including the cost of debt and property taxation" (proposed 35-A MRS §4004); "[d]ebt or liability of the company is not a general obligation or a moral obligation of the State or any agency or instrumentality of the State other than the company, and neither the State nor any agency or instrumentality of the State other than the company guarantees any debt or liability of the company" (proposed 35-A MRS §4005); and "[t]he company serves a public purpose in the carrying out the provisions of this chapter, but debt or liability of the company is not a general obligation or moral obligation of the State" (proposed 35-A M.R.S. §4006). (R. 0014.)

Throughout the proposed Legislation, the company to be formed is referred to consistently as a "consumer-owned transmission and distribution utility" (R. 0007, 0008), which

is contrasted with the "investor-owned transmission and distribution" utilities to be acquired by the Company. (R. 0007, 0008, 0010; *see* R. 0007, 0010–0016 (referencing "investor-owned transmission and distribution" utilities).) The term "quasi-governmental" does not appear in the Application. (R. 0005–0017.)

By letter dated September 24, 2021, the Secretary provided Petitioner Jortner with a copy of the Legislation as revised by the Secretary and the Office of the Revisor of Statutes (the "**Revisor**") from the language proposed in the Application. (R. 0019–0020; *see* R. 0021–0035.) In drafting the Legislation, the Secretary and Revisor left unchanged the provisions defining the Company as a "consumer-owned transmission and distribution utility" through the amendments to 35-A M.R.S §§ 3501(1)(D)–(F) (*Compare* R. 0010 *to* R. 0022) and the creation of 35-A M.R.S. § 4003 (*Compare* R.0010 *to* R. 0026).

The Secretary and Revisor also approved for insertion into the Legislation a "**Summary**," which describes the entity to be formed as:

> [A] privately-operated, nonprofit, *consumer-owned* utility controlled by a board the majority of the members of which are elected. The company's purposes are to provide for its *customer-owners* in this State reliable, affordable electric transmission and distribution services and to help the State meet its climate, energy and connectivity goals in the most rapid and affordable manner possible.

(R. 0034-0035 (emphasis added).) It goes on to describe how the company will be organized, directed and financed. (R. 0034–0035.) Like the proposed language in the Application, the term "quasi-governmental" appears nowhere in the Legislation, including the Summary.

The petition for the Legislation was issued on October 22, 2021 (the "**Petition**"). The Petition is headed by the Summary and an "Estimate of Fiscal Impact," both of which describe the Company as a "consumer-owned transition and distribution utility." (R. 0038.) The phrase "quasi-governmental" is not used in any section of the Petition. (R. 0038–0045.)

The Petition was duly circulated within the Maine electorate for signature. *See* 21-A M.R.S. § 903-A. On October 31, 2022, Petitions with over 80,000 signatures were returned to the Secretary of State. (R. 0046.) The Secretary reviewed the signatures and, on November 30, 2022, determined that 69,735 signatures were valid. (R. 0046-0047.) That number exceeded 63,067, the minimum threshold for a statewide initiative. (R. 0046; *see* Me. Const. art. IV, pt. 3, § 18.) The Secretary accordingly undertook to draft the Ballot Question.

The Secretary's first draft was in the following form:

> Do you want to create a new quasi-governmental owned power company governed by an elected board to acquire and operate existing electricity transmission and distribution facilities in Maine?

(R. 0048.) By press release dated December 21, 2022, the Secretary released the draft question for public comment within a 30-day period commencing on December 22, 2022. (R. 0048–0049.)

The Secretary's draft question introduced for the first time the terms "quasi-governmental" and "power company" into the description of the Company. (R. 0048–0049.) All prior descriptions of the Company, including in the Legislation and the Petition, had used the term "consumer-owned power company," "consumer-owned utility" and similar terminology. (R. 0022–0035 (the Legislation); R. 0038–0045 (the Petition).)

The great bulk of the comments filed by individuals and organizations with an interest in the Legislation found the term "quasi-governmental" to be confusing and/or misleading. Commenters considered it to be "vague" (R. 0192 (David Coleman)); "confusing and misleading" (R. 0051 (Ethan Bien)); "designed deliberately to dissuade voters with disinformation about the proposal" (R. 0057 (Vernon Lickfeld)); "confusing, not what the act proposes, and language not used in Maine law" (R. 0062 (Joseph DeGraff)); "unintentionally confusing" and "perhaps misleading" (R. 0209–0211 (Maine People's Alliance)); "inaccurate

and misleading" (R. 0188 (Robert Eaton)); "a vague term that does not really impart useful information to voters" (R. 0189 (Cynthia Robbins)); "confusing and inaccurate" (R. 0197 (Colin Vettier)); "inaccurate" (R. 0201 (Dayle and Tom Ward)); likely to "mislead voters" (R. 0196 (Jon Albrecht)); "not reflect[ive] [of] the intention that is being put forth" (R. 0191 (Jordan Chalfont)); "inaccurate and . . . confusing to voters" (R. 0200 (Marianne McHugh-Westfall)); "not accurately reflect[ive] [of] the legislation as printed on the petitions" (R. 0198–0199 (Michael Dunn)); "quite deceptive" (R. 0185 (Susan Lubner)). The foregoing quotations are only a handful of more than 100 comments that found the term "quasi-governmental" to be not generally understandable and likely to mislead. (*See* R. 0050–0255.)

The relatively few comments supporting the use of the term "quasi-governmental power company" came almost entirely from political action arms of CMP and Versant, the two private utilities that would be bought out by the consumer-owned power company envisioned by the Legislation, and from business and labor organizations allied with the utilities. The submission from CMP's "Maine Affordable Energy Coalition" praised the term "quasi-governmental power company" as the descriptor for the Company.[2] (R. 0236–0237.) The submission by attorneys for Versant's "Maine Energy Progress" commented favorably on the "accurate description of the new entity as "quasi-governmental."[3] (R. 0172, 0228.)

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[2] The submission by Maine Affordable Energy Coalition seriously miscites *Baker Bus Service v. Keith*, 416 A.2d 727 (Me 1980) by suggesting it stands for the proposition that "an entity governed by elected officials . . . is in fact a unit of government." (R. 0237.) The issue in that case was whether a school bus company under contract to the City of Augusta should be classified as a "public employer" because of its agency relationship with the city. *Keith*, 416 A.2d at 730–732. The Law Court opinion says nothing about the proposition for which it was cited. *Id.*

[3] Their support for this terminology is understandable given their vested interest in wanting the Legislation to fail. The term "quasi-governmental" resonates with the opponents' campaigns against the Legislation, which appear to be based on popular distrust of all things "governmental" and voters' fear of creating additional tax-supported governmental entities for which all taxable Mainers will be on the hook. For instance, the Affordable Energy Coalition Web site rails against "Government-Controlled Power" that could result in "Billions of Debt." Maine Affordable Energy Coalition, *Our Coalition*,

On January 30, 2023, following the expiration of the comment period, the Secretary issued the Decision, which proposed the final wording for the Ballot Question. (R. 1-4) Although the term "owned" would be dropped, the rest of the language originally proposed would stay. The Pine Tree Power Company would be described for the voters as:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

(R. 0001–0004.)

On February 9, 2023, the Petitioners filed a timely appeal of the Decision, asking the Court to (a) rule that the use of the term "quasi-governmental power company" to describe the Company is not "understandable to a reasonable voter reading the question for the first time" and will "mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes" and to (b) modify the Ballot Question to use the term "consumer owned transmission and distribution utility" instead.

STANDARD OF REVIEW

Section 905(2) of Title 21-A provides for a special standard of review for Rule 80C challenges to initiative or referendum ballot question language as drafted by the Secretary:

> In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes.

21-A M.R.S. § 905(2) ("This action must be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by this section."). In *Olson v. Secretary of State*, the Law Court construed this language as the single legal standard by which to assess ballot

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https://maineaffordableenergy.org/show-your-support/our-coalition/ (last visited February 20, 2023). Likewise, the Maine Energy Progress Web site proclaims, "A Government-Controlled Utility Company is a Risk Mainers Can't Afford." Maine Energy Progress, *A Government-Controlled Utility Company is a Risk Mainers Can't Afford,* https://www.maineenergyprogress.com (last visited February 20, 2023).

language on appeal, subsuming the Constitutional requirement that the question be presented "concisely and intelligibly" and the requirements of 30-A M.R.S. §906(6) that the language be drafted "in a clear, concise and direct manner that describes the subject matter of the ...direct initiative as simply as is possible":

> Both section 906(B) and section 20 of the Constitution further the goal set forth in section 905 that the ballot question be "understandable" and "not misleading." For the purposes of the present case, the requirements that the question be clear, simple and intelligible are subsumed in the standards provided in section 905. If a question is understandable and not misleading, it follows that it is not lacking in clarity and is intelligible. Thus, we *independently review* whether the description of the subject matter of the ballot question is "understandable" and "will not mislead."

1997 ME 30, ¶ 6, 689 A.2d 605 (emphasis added). Thus, the Superior Court's review of the ballot language according to this standard is *de novo* and without deference to the prior action by the Secretary.[4] *Id.* ¶ 4 ("[b]oth the Superior Court and we are required to independently determine whether the ballot question is understandable and not misleading.").

[4] This standard of review is an exception to the default rules governing appeals of agency action. Generally, when considering a statute under review pursuant to Rule 80C, the Court must "review the interpretation of a statute directly for errors of law" and "attempt to give effect to legislative intent by examining the plain meaning of the statutory language." *Melanson v. Sec'y of State*, 2004 ME 127, ¶ 8, 861 A.2d 641 (citations omitted); *see Carrier v. Sec'y of State,* 2012 ME 142, ¶ 12, 60 A.3d 1241 ("When a statute is unambiguous, we interpret the statute directly, without applying the rule of statutory construction . . . or the agency's interpretation[.]"). Only if the statute is ambiguous and within an agency's expertise does the Court show deference to the its interpretation thereof. *Maine Ass'n of Health Plans v. Superintendent of Ins.,* 2007 ME 69, ¶ 32, 923 A.2d 918; *Competitive Energy Services LLC v. Pub. Utilities Comm'n,* 2003 ME 12, ¶ 15, 818 A.2d 1039; *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 17, 88 A.3d 154 ("The plain meaning of a statute always controls over an inconsistent administrative interpretation."). As explained by the Law Court in *Olson,* section § 905(2) modifies the Rule 80C standard and requires the Superior Court to apply the non-deferential standard set forth therein when there is a challenge to the language of a Ballot Question. *Olson,* 1997 ME 30, ¶ 4, 689 A.2d 605 (rejecting the argument that Rule 80C provided the operative standard of review); *see Caiazzo v. Sec'y of State,* 2021 ME 42, ¶¶ 14–15, 256 A.3d 260 (differentiating between the standard of review under section 905(2) that applies to an applicant's appeal of a ballot question with the general 80C standard that applies to reviews of final agency action).

SUMMARY OF ARGUMENT

The use of the term "quasi-governmental power company" to describe the consumer-owned transmission and distribution utility to be created by the Legislation is inaccurate, confusing, misleading and prejudicial; thus, it does not pass the standard of review provided by 21-A § 905(2) that a ballot question must be "understandable" and "will not mislead."

The term is not "reasonably understandable" because voters are unlikely to know what "quasi-governmental" means given that there is no statutory definition of the term and the dictionary definition is the exact opposite of what the Legislation creates.

The term is "misleading" because the entity to be formed is not "quasi-governmental" in that it has no governmental functions and is economically supported solely by its consumers—not taxpayers—and the Legislation expressly defines the Company as an "consumer-owned transmission and distribution utility" by listing it with similar utilities under 35-A M.R.S. §3201(6). The wording is likely to cause voters to vote contrary to their wishes because the use of the "quasi-governmental" carries with it clear connotations regarding the funding and operation of the Company that are directly at odds to what is proposed by the Legislation, thereby discouraging and disillusioning educated citizens from voting in accordance with their wishes.

The use of the term "quasi-governmental" is egregious in the light of the ready applicability of the correct and legally defined term "consumer-owned transmission and distribution utility" to describe the entity that the voters will be creating by adopting the Legislation.

ARGUMENT

I. THE SECRETARY'S USE OF THE TERM "QUASI-GOVERNMENTAL POWER COMPANY" IS NOT "UNDERSTANDABLE TO A REASONABLE VOTER" AND IS LIKELY TO MISLEAD VOTERS INTO VOTING CONTRARY TO THEIR ACTUAL WISHES.

A. The lack of a statutory definition for "quasi-governmental" upon which reasonable voters can rely renders it incomprehensible and misleading.

The requirements of both 21-A M.R.S. § 906(6) and the Maine Constitution, specifically Article IV, Part 3, Section 20, that govern the wording of ballot questions are subsumed by the standard of review set forth in § 905(2), which instructs the Court to independently certify that ballot language (a) is understandable to reasonable voters and (b) will not mislead them in the exercises of their franchise. This standard requires that recondite, vague or undefined terms be avoided. The term "quasi-governmental" is just one of those terms. The problem that citizens will invariably face in the ballot box when confronted with that language is that no one, despite any due diligence, will know what it really means.

First of all, the term "quasi-governmental" has no statutory definition and appears rarely in the Maine Revised Statutes. A word search of the Maine Revised Statutes discloses that the term "quasi-governmental" is found less than a dozen times in the entire body of Maine statutory law. In Title 35-A, which governs Maine's public utilities, the term appears only once, as an example of an "entity" without any further definition.[5] 35-A M.R.S. §3201(9). This goes also for the other miscellaneous statutory appearances of "quasi-governmental." In almost every case it appears in a list of organizations to which particular provisions apply or do not apply. For instance, in 38-A M.R.S., the title that governs environmental protection, the definition of "Person" reads:

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[5] 35-A M.R.S. §3201(9). "'Entity' means a person or organization, including but not limited to any political, governmental, quasi-governmental, corporate, business, professional, trade, agricultural, cooperative, for-profit or nonprofit organization."

> [A[ny natural person, firm, association, partnership, corporation, trust, the State and any agency of the State, governmental entity, quasi-governmental entity, the United States and any agency of the United States and any other legal entity.

38 M.R.S. §562-A(16); *see* 5 M.R.S. §102(7) (excluding a "quasi-governmental entity" from the definition of "Entity"); 33 M.R.S. 3201(9) (definition of "Entity"); 33 M.R.S. §1551(1-A)(definition of "Owner"); 33 MRS §1581(1) (definition of "Holder"); 38 M.R.S. 424-C(C) (definition of "Person").

The key is that there is no statutory definition of the term *anywhere*, and the various contexts in which it is found do not impart any discernable meaning of the term, whether as used with that statute or as it would relate to the Legislation.

As an exercise, one might try to define "quasi-governmental" in a few words. Does it mean that the entity described resembles the government in terms of its organizational structure, such as a tenant's association or club with regulatory powers over members; in terms of direct ownership, such as a state-owned turnpike authority; or in terms of public funding, such as a housing authority or state university? Without a codified definition, it is impossible to get one's fingers on what is meant by "quasi-governmental" at all, let alone in the context of a potential purveyor of utility services for Maine consumers. As explained by a commenter:

> "Quasi-governmental' is not a commonly used term and the use of the word 'quasi' gives the average reader the sense that what is being proposed isn't very defined. It's "sort of this" and "sort of that." "Consumer-owned' has frequently been used in Maine law and will be readily understood by the average voter.

(R. 0142 (Michelle Henkin)). Indeed, in the absence of a real definition of the term "quasi-governmental" one could characterize both Central Maine Power Company and Versant Power as "quasi-governmental" in that they are both ultimately owned and controlled by governmental entities. Versant's controlling stockholder is the City of Calgary, Alberta, Canada. (R. 0204–0205 (Toby McGrath); R. 0205 (Senator Richard Bennet and Representative Nathan Carlow).)

The largest investor in CMP's parent company is the Middle Eastern nation of Qatar. (R. 0204–0205.)

The lack of any statutory definition of "quasi-governmental" can be contrasted with the express statutory definition of "consumer-owned transmission and distribution utility" set forth in 35-A M.R.S. § 3501(1), to which the Company will be expressed added under the proposed subparagraph F. That definition perfectly encapsulates what the Legislation proposes—i.e., the creation of a "transmission and distribution utility that is wholly owned by its consumers, including its consumers served in the State." 35-A M.R.S. § 3501(1).

Furthermore, Title 35-A is replete with references to "consumer-owned transmission and distribution utility," some fifty-five in all. These references flesh out the statutory definition and give a good idea of what a consumer-owned transmission and distribution utility really *is* and *does*. These provisions make clear that consumer-owned transmission and distribution utilities are subject to full regulation of their service by the Maine Public Utilities Commission; that they must charge fair and reasonable rates; that they must get Commission approval for major rate changes and the issuance of securities. None of these connotations is associated with the term "quasi-governmental." Indeed, from the words themselves, one might mistakenly assume that a "quasi-governmental power company" would self-regulated and/or not be required to charge fair and reasonable rates, exactly the opposite of what is the case here.

B. "Quasi-governmental" will confuse and mislead reasonable voters because it is a term that is neither commonly used or understood.

A serious drawback to the use of terms like "quasi-governmental" in ballot questions for public referenda is the general lack of familiarity with this term on the part of the general public. As one commenter put it, "'quasi-governmental' will be a head-scratcher." (R. 0090 (Stephen Benson).) Several members of the public echoed this sentiment:

- "I do not believe the average voter understands what "quasi-governmental owned" means. I certainly do not! (R. 0060 (Ezra Sassaman));

- "Specifically, the phrase 'quasi-governmental' is not only grammatically suspect but is imprecise and does not reflect the intention of the campaign to mirror more descriptive language already enshrined in Maine law." (R. 0068 (Francis Moulton));

- "My reason is because the word has meanings other than partly. I automatically think it means fake, pseudo, bogus. It is a very poor choice of words." (R. 0070 (Melissa Berky)).

By contrast, it is relatively easy for a voter to gain a reasonably accurate understanding of a "consumer-owned" utility, especially as a foil to the investor-owned utilities that compose the *status quo* in most, but not all, of the State of Maine. With a consumer-owned utility, the consumers of utility service bear the financial responsibility for the service. That is what "consumer-owned" *means*. Thus, practically all voters who read this terminology would know what they would be getting themselves into if the electorate adopts the Legislation.

Indeed, reasonable voters are likely to understand the term "consumer-owned" far better than "quasi-governmental" because of their own familiarity with consumer-owned utilities, which serve some 98 communities sprinkled throughout the State. It is likely that many voters will be familiar with one or more of these existing consumer-owned utilities and will have an idea of what a consumer owned electric company is and how it operates. As a commenter explained:

> In talking to Calais voters, who have been a part of an existing consumer-owned electrical co-op for decades, voters are quite familiar with the term 'local consumer-owned.' This is a clear term and is already used in Maine law.

(R. 0176 (Sharon Dean)).

The same is not true for a "quasi-governmental power company." There is no existing electric utility in this state that is classified as such. Maine voters would therefore have no examples of existing enterprises to consider as they cast their votes.

Put another way, how many voters would read and understand the term "quasi-governmental" to refer to an enterprise in which the ultimate financial responsibility is borne by the consumers of its services rather than some level of public government? Likely very few, because "[t]he implication when using the words 'quasi-governmental' is that the government of Maine would own the company." (R. 0116 (Nicholas Pellenz).) The word "consumer" does not even appear in the Ballot Question approved by the Secretary. Even a sophisticated reader broadly familiar with the Legislation would be hard pressed to infer ultimate consumer responsibility from the term "quasi-governmental" as used in the Ballot Question.

As Ben Chin of the Maine People's Alliance pointed out to the Secretary in written comments, in assessments such as the Flesch Reading Ease, Gunning's Gog Scale Level, Flesch-Kincaid Grade Level and the Dale-Chall Score, the term "quasi-governmental power company" rates as "very difficult" in terms of understandability, usually requiring more than a college education—currently possessed by about one third of Maine voters. (R. 0209.) On the other hand, the notion of a consumer-owned utility to provide electric service is understandable to persons who have completed high school—90% of Maine adults over 25. (R. 0209–0210.)

Use of terminology that is likely to be understood by only a third of the adult population is not "understandable to a reasonable voter reading the question for the first time," even if they "discharge their civil duty to educate themselves about the initiative." *Olson,* 1997 ME 30, ¶ 11, 689 A.2d 605. As explained by a commenter, "it will mislead voters into making a decision against their own best interest." (R. 0064 (Christopher Cushing)). That is *exactly* the outcome the Court must prevent pursuant to 21-A M.R.S. § 905(2).

1. The Dictionary definition of "quasi-governmental" Is the Opposite of the Company.

The Merriam-Webster Dictionary, founded by Noah Webster in 1828, is generally regarded as the best concise authority on the accepted meaning of words in the American

language. In its online embodiment, the Merriam Webster Dictionary defines "quasi-governmental" as "supported by the government but managed privately."[6]

This Dictionary definition makes clear how inappropriate the term "quasi-governmental" is when applied to the Company. If enacted, the Legislation creates an entity (i.e., the Company) that is *not* financially supported by the government; the Company will rely 100% on revenues from electric service consumers. The definition further implies that the Company will be "managed privately." That is also off the mark. Although day-to-day operations will be contracted out to a private operator, ultimate management and control of the Company is vested in a publicly-elected Board of Directors, not some private entity. (R. 0040 (proposed 35-A M.R.S. § 4002(2) (vesting governance of the Company in the Company Board)); R. 0041 (proposed 35-A M.R.S. § 4003(3) (providing for routine operations by a private contractor)).)

These are exactly the kind of misimpressions that the opponents count on to kill the Legislation. It is one thing if the voters, properly informed, decide that they do not want to consumer-owned transmission and distribution utility. But it is quite another matter for them to be given the false impression that they are being asked to create an entity that would be financially supported by the government and managed privately. The law requires the Court to prevent such misapprehensions from misleading reasonable voters.

2. *"Quasi-governmental power company" suggests a seller of power—not a transmission and distribution utility.*

Although the principal vice of the Ballot Question is its use of "quasi-governmental" that will cause reasonable voters to guess at what it means and mistakenly associate the new consumer-owned utility with "government," the use of the term "power company" is also

[6] "Quasi-governmental," https://www.merriam-webster.com/dictionary/quasi-governmental (last visited February 20, 2023). To determine the meaning of an undefined term, the Court may consult dictionaries for guidance. *See, e.g., State Tax Assessor v. MCI Commc'ns Servs., Inc.*, 2017 ME 119, ¶ 14, 164 A.3d 952; *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 9, 91 A.3d 601.

problematical. As is the case with both Central Maine Power Company and Versant Power, the Company will be a "transmission and distribution utility." It will not generate any power, but merely transmit and distribute electric power that its customers have contracted to purchase from independent power producers who generate the actual electric energy that is transmitted by the utilities to the consumers.

In order to make it maximally likely that a reasonably-informed Maine voter, on reading the Ballot Question for the first time, will understand what she or he is voting for, the Ballot Question should replace the term "power company" with "transmission and distribution utility." Customers of Maine's two large investor-owned transmission and distribution utilities have been living with disaggregated electric services for twenty years or more. The Ballot Question should use the terminology that is current and that makes clear the actual role of the enterprise—*viz.*, the transmission and distribution, but not generation, of electric power.

3. *"Quasi-governmental" gives the misleading impression that the Company will be an organ of government that is taxpayer-supported.*

The dictionary definition of "quasi-governmental" as "supported by government" reflects the general understanding of the population that an organization designated as "governmental," regardless of qualifier, is supported by tax revenues. To the average citizen, more "government" means more taxes. Any apparent effort to increase "government" is likely to cause reasonable voters to believe they are supporting an increase in taxes, regardless of the actual language of the legislation they are being asked to adopt.

This is of course not the case with the Company. The Legislation makes this very clear in several places. Its sole source of support is revenues from services rendered to consumers; its takeover of the existing investor-owned transmission and distribution assets and its rendering of public service as a consumer-owned transmission and distribution utility will not cost Maine

taxpayers at penny. (R. 0031 (proposed 35-A M.R.S. §§ 4005, 4006.) To call the Company "quasi-governmental" is to misrepresent its character in a vital respect.

As was repeatedly pointed out in the comments, use of the term in the Ballot Question gives the misimpression that the voters will be establishing yet another governmental agency that will have a claim on their taxes. As one commenter put it, "[w]hen you say Pine Tree Power (PTP) will be 'quasi-governmental' you play into the hands of CMP who is trying to tell the public that PTP will be just another bureaucratic branch of the State government." (R. 0072). It is highly likely that such a misimpression would make the Ballot Question not understandable and likely to "mislead a reasonable voter" to act contrary to their wishes out of an unwarranted fear of increased taxes. One can hardly think of another term that would so likely lead to the measure being torpedoed by the very voters who would otherwise support it.

The erroneous notion that the new entity might have a claim on governmental support would be particularly troublesome to voters in the ninety-eight Maine towns and political subdivisions currently served by Maine's ten existing consumer-owned transmission and distribution utilities. They are already supporting customer-owned electric networks and would not want to be taxed to support a governmental enterprise serving other Maine consumers formerly served by the investor-owned utilities.

The misleading nature of "quasi-governmental" is made plain by the exploitation of the concept by the political action groups sponsored by CMP and Versant Power to link a vote in favor of the referendum with the increased tax burden.[7] The strong association of "government"

[7] For instance, the Web site of Maine Energy Progress refers to "A Government-Controlled Utility Company is a Risk Mainers Can't Afford." Maine Energy Progress, *A Government-Controlled Utility Company is a Risk Mainers Can't Afford,* https://www.maineenergyprogress.com (last visited February 20, 2023). While the Web site avoids the word "taxes," the clear impression from the references to "Government" and "Mainers" and "afford" in the same sentence is that the burden of this enterprise will

and "quasi-government" with "taxes" in the mind of most Maine voters is already being misused and falsely exploited by opponents of the Legislation. Under these circumstances the term "quasi-governmental" has no place in a description of a consumer-owned transmission and distribution utility that will be supported solely by revenues and will have no claim to support by taxes.

4. *"Quasi-Governmental" misleads voters into thinking the Company will be run by the government.*

Putting the bogeyman of taxes temporarily aside, many citizens in Maine, as elsewhere, regard "government" with a healthy dose of suspicion as adding burden to their lives and restrictions to their freedoms in the form of increased requirements and regulations. This is because much of what state, federal and even municipal government does involve the adoption of various forms of rules and regulations that trammel citizens ability and right to do what they please in any number of areas of individual and communal activity.

However, the Company is not at all "governmental" in that sense. It does not have the power to enact rules or regulations. It would have no more power to affect the lives of Maine citizens than the investor-owned utilities that it would replace.[8] Its sole purpose and function is to do well

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be on Maine taxpayers—not the Company's consumer-owners. CMP's political action arm, Maine Affordable Energy, states on its Web site that the Company is:

> A scheme to seize Maine's electric grid by eminent domain would create a government-controlled utility — and we would all be on the hook for the cost.

Maine Affordable Energy Coalition, *Our Coalition*, https://maineaffordableenergy.org/show-your-support/our-coalition/ (last visited February 20, 2023). The use of these buzzwords is designed to cause Maine voters to stop in their tracks and vote "No" without further investigation into what the Company really is. The juxtaposition of "government-controlled" and "we would all be on the hook" gives the misimpression that the government-controlled entity would be supported like other organs of government by taxes on all of the citizens.

[8] In fact, as has been pointed out, both of Maine's major investor-owned electric utilities, have more "governmental" power, in the form of a general power of eminent domain, than would the Company. (R. 0247–0248.) As a consumer-owned transmission and distribution utility, the Company would have this

what the current utilities are doing badly—transmit and deliver electric energy that is generated by others efficiently and economically to Maine's electricity consumers. No employee of the Company will be an employee of any governmental unit or institution. The fact that a slim majority of the members of its Board of Directors are elected does not give it any powers that can reasonably be termed "governmental."

Consequently, it does not deserve to be tagged with the adverse connotations of "government" in the minds of many Maine voters, particularly when that term is fundamentally contrary to the purpose and effect of the Legislation. "To describe the new system on the ballot as a "quasi-governmental owned power company is inaccurate and completely misleading. Many Maine voters would not want a 'governmental owned power company . . . .'" (R. 0074 (Corliss Davis).) "The term 'quasi-governmental' will turn off people who would otherwise be inclined to support the proposal." (R. 0154 (Debra McDonough).)

As stated by one commenter, "Quasi-governmental can be a very triggering term for many people." (R. 0110 (Susan Graham).) The Ballot Question serves to reinforce the "misrepresentation based on a fictional advertisement message, which saturated media during our signature campaign that the proponents wanted 'government owned' electric utility." (R. 0082 (Randall A. Farr).) In the words of Harlan Baker, a former member of the Public Utilities Committee who served in the Maine Legislature:

> By mischaracterizing the utility as quasi-government, [the Secretary] leaves the door open for the IOUs [investor-owned utilities] to characterize it as government monopoly and use the same tactics that they used in the 1973 public power referendum.

(R. 0095.) His concern was echoed by others:

> I spent many hours gathering signatures on petitions for this, and one of the most common first reactions was that people didn't want the government to be in charge

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power only in connection with its acquisition of the assets of CMP and Versant Power. (R. 0041 (proposed 35-A M.R.S. § 4003(6)).)

> of their electricity. It is important to know that this would be CONSUMER OWNED.

(R. 0108 (Clare Prontnicki).)

> Any suggestion that the new utility would be "quasi-governmental' plays into the highly misleading and aggressive campaign of the investor-owned utilities in their attempt to persuade the voters that the ballot question proposes a "government takeover".

(R. 0143 (Wayne Jortner).) It is impossible to say that inclusion of "quasi-governmental" in the Ballot Question will not "mislead a reasonable voter." Thus, the term "quasi-governmental" has no place in an accurate description of the Pine Tree Power Company in the Ballot Question.

Because the Secretary's use of the term "quasi-governmental" makes the Ballot Question not "understandable to a reasonable vote reading the question for the first time" and is likely to "mislead a reasonable voter who understands the [Legislation] into voting contrary to that voter's wishes," 21-A M.R. S. §905(2), the Ballot Question violates both of 21-A M.R.S. § 906(6) and Article IV, Part 3, Section 20 of the Maine Constitution. Therefore, the Court must vacate the Decision and modify the Ballot Question as proposed herein.

II. THE COMPANY SHOULD BE DESCRIBED AS WHAT IT IS, A 'CONSUMER-OWNED TRANSMISSION AND DISTRIBUTION UTILITY'

From the very beginning of the process which has brought Petitioners this far in the campaign to create the Company, in all documents generated, filed and circulated, both with the Secretary and with the members of the public who signed the Petition, the Company has *always* been referred to as a "consumer-owned power company," "consumer-owned transmission and distribution utility," or the equivalent. (R. 0005–0017 (the Application); R. 0021–0035 (the Legislation); R. 0034–0035 (the Summary); R. 0038–0045 (the Petition).) Title of the Legislation is "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility" (R. 0039). The Summary, as approved by both the Revisor and the Secretary herself and printed prominently on the Petition as circulated and signed by voters refers to the Company as

"a privately-operated, nonprofit, *consumer-owned utility*." (R. 0034 (emphasis added).) The term quasi-governmental has *never* appeared in the discourse before being proposed by the Secretary in her initial wording of the Ballot Question. (R. 0048.) (Ironically, in the very same press release opening the Ballot Question for public comment, the Secretary referred to the initiative as the "consumer-owned utility legislation." (R. 0048.)) In this sense, the term "quasi-governmental" would be an abrupt departure from the accurate terminology to describe the Company that has been employed by all parties up to the present time. There is no reason to depart from what all the parties, including the 69,735 voters who signed the Petition, understood as the description of what they were proposing, evaluating and supporting up to this point.

A. The terms "consumer-owned power company" or "consumer-owned transmission and distribution utility" have accompanied the Legislation from its earliest days.

From the beginning of the campaign for the Legislation, the Company has been described as a "consumer-owned power company" or a "consumer-owned transmission and distribution utility." Those are the terms that describe the new entity in the Application; in the various filings with the Secretary; in the Legislation, as approved by the Revisor and the Secretary; on the Petitions themselves; and in the Summary approved by the Revisor. (R. 0005–0017 (the Application); R. 0021–0035 (the Legislation); R. 0034–0035 (the Summary); R. 0038–0045 (the Petition).) That is no surprise. Those terms accurately describe the Company, as defined by the Legislation:

> I am concerned by the phrase "quasi-governmental" in this question. As someone who collected many signatures for this initiative, I never once used this terminology or anything like it while gathering signatures. It also does not reflect the terminology of the proposed law itself. I ask that you rephrase it to more closely mirror the language of the initiative and the recommendations of the Public Utilities Commission.

(R. 104 (Thomas McMillan).)

> The phrase "quasi-governmental owned power company is confusing and misleading. I collected signatures to get a consumer-owned utility established. And

> that is much easier to understand. We are consumers and we will have a direct stake in the company."

(Susan Rae-Reeves, R. 0086).

Through the Legislation, citizens are presented with a clear, binary choice—the creation of a "consumer-owned power company" versus the status quo offered by the investor-owned utilities. To introduce a new and confusing terminology at this point will lead voters who have become familiar with the accurate language heretofore in use to wonder whether the entity on the ballot is really the consumer-owned power company that has figured in the signature campaign and public debate to date. That language used by the Secretary is not only different, but is also recondite and laden with unfavorable associations with government and taxes, makes the departure more extreme and misleading. The Court must therefore modify the Ballot Question to reflect the reality of the choice facing voters in November.

B. The most accurate description of the Company is that provided by Maine statute.

The term "consumer-owned transmission and distribution utility" is not only the term chosen by the parties in their communications to date; it is also the legally-correct and factually-clear description of the Company that would be "understandable to a reasonable voter reading the question for the first time" and would not "mislead a voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R.S. § 905(2).

Voters who vote in favor of a "consumer-owned transmission and delivery utility" would get what they are voting for. The Company is defined as such in the very legislation that the voters will be asked to approve. Moreover, when one considers Title 35-A as a whole, it is clear that the category of "consumer-owned transmission and distribution utilities" is where the Company belongs. (R. 0039 (proposed amendments to 35-A M.R.S. § 3501).) All of the other similar enterprises, whether municipals or cooperatives, are each defined as a "consumer-owned transmission and distribution utility." 35-A M.R.S. § 3501(1). The only other category for an

electric utility is an "investor-owned transmission and distribution utility," which "means a transmission and distribution utility other than consumer-owned transmission and distribution utility as defined in section 3201."[9] 35-A M.R.S. §3104(1)(A). There is no regulatory category for "quasi-governmental" entities, and indeed the term appears only once in the entirety of Title 35-A.[10]

The Company is also "consumer-owned" in that, like the others in its regulatory category, the financial benefit and burdens of its activities are entirely borne by its consumers. It has no "owners" other than its customers. "Consumer-owned" in the designation makes this clear. "Quasi-governmental" does not.

"Transmission and distribution utility" is likewise more accurate than "power company" in describing the Company. "Power company" carries the connotation that the entity both generates and sells power as well as transmit and distribute it to customers. Several of those commenting on the ballot question made this point. (*See, e.g.,* R. 0050 ("The new entity is better described as a distribution and transmission public utility. The new entity will not own or manage 'power.'").) While the Company and some of the other Maine transmission and distribution utilities, including Central Maine Power Company and Versant Power, all use the term "Power" in their names, in the ballot description of what the Company is and does, "transmission and distribution utility" is the appropriate term for the Legislation to be "understandable to a reasonable voter." 21-A M.R.S. § 905(2). Therefore, to ensure that reasonable voters understand the Legislation when reading the Ballot Question for the first time and to prevent voters who understand the

[9] It is believed that currently these include only Central Maine Power Company and Versant Power Company, both of which are owned by foreign utility holding companies and ultimately by foreign governments. (*See* R. 0204–0205.)

[10] See note 5 above.

Legislation from being misled into making a decision contrary their wishes, the Court must vacate the Decision and modify the Ballot Question.

CONCLUSION

For the reasons above stated, the Petitioners respectfully request that the Court (a) vacate the Decision on the grounds that the Secretary's formulation of the Ballot Question referring to a "quasi-governmental power company" is "misleading" and insufficiently "understandable to a reasonable voter"; (b) modify the Ballot Question by replacing "quasi-governmental power company" with the term "consumer-owned transmission and distribution utility."

Dated: February 21, 2023.

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Counsel for Petitioners

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-2023-007

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI,

Petitioners,

v.

SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine,

Respondent.

CONSENTED-TO MOTION TO EXPEDITE FILING OF ADMINISTRATIVE RECORD AND BRIEFING SCHEDULE

Pursuant to Rule 80C(f) and Rule 80C(g) of the Maine Rules of Civil Procedure and 5 M.R.S.A. § 11005, and with the consent of Respondent's counsel, Assistant Attorneys General Jonathan Bolton and Paul Suittor, Petitioners Wayne R. Jortner, Richard Bennett, John Clark, and Nicole Grohoski ("Petitioners") hereby move the Court to set an expedited schedule for the filing of the administrative record and the parties' briefs in the above-captioned matter on the following grounds:

1. This action concerns a challenge by Petitioners to the proposed wording of a citizens initiative entitled "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility," which will appear on the state-wide ballot on November 7, 2023.

2. As such, it is governed by Rule 80C and 21-A M.R.S.A. § 905, which expressly advises the Court to resolve this matter on an expedited basis:

> The court shall advance the action on the docket and give it priority over other cases when the court determines the interests of justice so require. The court shall issue its written decision containing its findings of fact and stating the reasons for its decision before the 40th day after the decision of the Secretary of State.

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21-A M.R.S.A. § 905(2); *see Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 15, 256 A.3d 260 (recognizing that 21-A M.R.S.A. § 905(2) triggers an "expedited schedule for court decision-making"). The Secretary of State's decision subject to this appeal was filed on January 30, 2023, so that the Court's written decision will be due on March 12, 2023 according to 21-A M.R.S. §905(2).

3. Rule 80C(g) provides the Court the authority to "increase or decrease the time limits prescribed in this subdivision" upon a showing of "good cause." M.R. Civ. P. 80C(g).

4. To facilitate the Court's prompt review and adjudication of this action, counsel for Petitioners and Assistant Attorneys General Jonathan Bolton and Paul Suittor who will appear as counsel for respondent Shenna Bellows ("Respondent") have agreed to an expedited timeline by which (a) the Respondent will file the administrative record with the Court pursuant to Rule 80C(f) and 5 M.R.S.A. § 11005 and (b) Petitioners and Respondent will file their briefs.

5. The proposed expedited schedule of proceedings is as follows:

    1. Respondent will file the administrative record by **February 15, 2023**.
    2. Petitioners will file their brief by **February 21, 2023.**
    3. Respondent will file her brief by **February 28, 2023.**
    4. Petitioners will file their reply by **March 3, 2023.**

6. There is good cause to expedite the schedule for resolving this appeal as proposed herein in order to provide the Court with sufficient time to consider and decide this case within the statutory deadlines cited above.

WHEREFORE, counsel for Petitioners, with the consent of counsel for Respondent, respectfully request that the Court enter an order expediting the filing of the administrative record and Petitioners' and Respondent's briefs as set forth above.

Dated: February 9, 2023.

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Peter L. Murray, Bar No. 1135
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Counsel for Petitioners Wayne Jortner, Richard Bennett, John Clark, and Nicole Grohoski

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(207) 773-5651

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
DOCKET NO. AP-23- 007

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI, Petitioners, v. SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine, Respondent.	)	**PETITION FOR REVIEW OF FINAL AGENCY ACTION**

Pursuant to 21-A M.R.S. §§ 901(7), 905(2); 5 M.R.S. § 11001; and M.R. Civ. P. 80C, Petitioners Wayne R. Jortner, Richard Bennett, John Clark, and Nicole Grohoski (collectively "Petitioners") hereby petition this Court to reverse the January 30, 2023 decision (the "Decision") of the Maine Secretary of State Shenna Bellows (the "Secretary") determining the final wording of the ballot question to be submitted to the Maine voters on the initiated legislation "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility" (the "Ballot Question").

By and through the Decision, the Secretary determined that the final wording of the Ballot Question will be as follows:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

The wording of the Ballot Question as determined by the Secretary violates the requirements of the Maine Constitution, Article IV, Part 3, Section 20, and of Maine law, 21-A M.R.S. § 906(6). Petitioners request that the Secretary's determination be set aside and the Ballot Question be modified to read:

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Do you want to create a new "consumer owned transmission and distribution utility" governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

PARTIES

1. Petitioner Richard Bennett is a resident of Oxford, Maine, and is a member of the Maine Senate. He was the lead Senate sponsor of LD 1708, the bill that preceded the ballot question that is the subject matter of this Petition. Senator Bennett is one of six Maine voters who signed the application to the Secretary to circulate the petition for the ballot question here under consideration (the "Petition"). He signed the Petition and was a circulator of the Petition. He submitted written comments to the Secretary objecting to the use of the term "quasi-governmental" to refer to the entity to be created by the Ballot Question.

2. Petitioner John Clark is a resident of Linneus, Maine, and a former General Manager of the Houlton Water Company, a "consumer-owned transmission and distribution utility" operating in the area of Houlton, Maine. He is one of the six Maine voters who signed the application to the Secretary of State to circulate the Petition. Mr. Clark shares the concerns expressed in the administrative record that customer-owners of the Houlton Water Company and other Maine consumer-owned utilities, residing in 98 Maine municipalities, will either fail to understand the unfamiliar and challenging phrase "quasi-governmental," and/or will be misled by the phrase to think the state will support the company by funding or backing its debt, thus putting these voters on the hook for any risks associated with the transaction.

3. Petitioner Nicole Grohoski is a resident of Ellsworth and a member of the Maine State Senate. Senator Grohoski is one of six Maine voters who applied to the Secretary of State to circulate the Petition. She also signed the Petition, circulated the Petition for signatures, and submitted comments objecting to the use of the term "quasi-governmental" to describe the Pine Tree Power Company.

4. Petitioner Wayne Jortner is a resident of Freeport, Maine, and a former member of the legal staff of the Maine Public Advocate. He is a proponent of efforts to replace Central Maine Power and Versant Power with a consumer-owned electric utility. He is one of the original six Maine voters who signed application for the Petition. He served as a circulator of the Petition and also filed comments with the Secretary objecting to the term "quasi-governmental" as tending to confuse and mislead Maine voters as to the nature of the entity that the voters will consider when voting on the Ballot Question.

5. Respondent Shenna Bellows, in her official capacity as Secretary of State for the State of Maine, is the constitutional officer charged with administering 21-A M.R.S. §§ 901–907, which governs direct petitions for initiated legislation, including the determination of the language of the ballot questions by which the initiated legislation will be submitted to Maine's voters in referenda.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction over this petition for review pursuant to 4 M.R.S. § 105(3)(A), 5 M.R.S. § 11001(1), and 21-A M.R.S. § 905(2).

The Court may exercise personal jurisdiction over the Secretary because this action seeks review of actions taken by the Secretary in her official capacity as an officer of the State of Maine under the Maine Constitution.

7. Venue is proper in Cumberland County pursuant to 5 M.R.S. § 11002(1)(A) because at least one of the Petitioners is a resident of Cumberland County.

LEGAL AND FACTUAL ALLEGATIONS

8. Article IV, Part Third, Sections 18, 19, 20, and 22 of the Maine Constitution and 21-A M.R.S. §§ 901-907 address the procedures related to citizen-initiated legislation. The sections of the Constitution and statutes most relevant to the issues raised by this action are:

Maine Constitution, Article IV, Part Third, §20:

> [Excerpt].....The full text of a measure submitted to a vote of the people under the provisions of the Constitution need not be printed on the official ballots, but, until otherwise provided by the Legislature, the Secretary of State shall prepare the ballots in such form as to present the question or questions concisely and intelligibly.

21 M.R.S. §906(6):

> **6. Wording of ballots for people's veto and direct initiative referenda.** Ballots for a statewide vote on a people's veto referendum or a direct initiative must set out the question or questions to be voted on as set forth in this subsection.
>
> A. ....
>
> B. The Secretary of State shall write the question in a clear, concise and direct manner that describes the subject matter of the people's veto or direct initiative as simply as is possible.

9. On August 16, 2021, six individual Maine citizens and voters including Petitioners Jortner, Bennett Grohoski, and Clark filed with the Secretary an application for a Petition for direct initiative of legislation to enact "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility."

10. On October 22, 2021, the Secretary approved and issued the form of the Petition to be submitted for signature by the requisite number of Maine voters.

11. The Petition was duly printed and circulated among the voters of the State of Maine. On October 31, 2022, signed Petitions with over 80,000 signatures were returned to the Secretary of State.

12. On November 30, 2022, the Secretary determined that 69,735 of the signatures submitted by Petition proponents were valid. Upon finding the Petition was supported by sufficient number of valid signatures, the Secretary found the Petition to be valid.

13. On December 22, 2022, the Secretary released for public comment a proposed ballot question for the initiative in the following form.

> Do you want to create a new quasi-governmental owned power company governed by an elected board to acquire and operate existing electricity transmission and distribution facilities in Maine?

14. Over the next thirty days, the Secretary received some 168 written comments from members of the public, including some of the Petitioners. Among the comments were the following statements on the use of the term "quasi-governmental owned power company" in the proposed ballot question:

a. "[A] complex, hazy, 5-word phrase that is not used in Maine statute, and will doubtless confuse many voters[.]"

b. "[I]inaccurate and misleading. Although there will be appropriate government regulation, there will not be government ownership to any degree."

c. "[A] vague term that doesn't really impart any useful information to voters. Better to just be clear. Call it what it is: local, consumer owned."

d. "[V]ague. According to the dictionary it means 'supported by the government but managed privately'. The bill should be more clear regarding who will own the utility and how it will be managed …

e. "What does "quasi-governmental' even mean? Please use clear language: 'consumer-owned' is it."

f. "[I]naccurate . . . . The words 'quasi-government organization' have legal meaning different from what is proposed by the initiative. Further, most voters do not know the meaning of these words, so they will be confused about what they are voting on."

15. On January 30, 2023, the Secretary issued the Decision, in which she made her determination of the final wording of the Ballot Question to be submitted to the voters in the referendum as follows:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

16. The Secretary's determination of the final language for the Ballot Question includes the reference to the entity to be created as a "quasi-governmental power company." This terminology is not an accurate description of the entity that the initiated legislation creates. That entity is more accurately described as a "consumer owned transmission and distribution utility," which tracks the language used to describe the Pine Tree Power Company in the Petition.

17. The term "quasi-governmental" power company suggests some kind of agency of government that produces and sells power. The Pine Tree Power Company is not an agency of government and has no governmental functions as those are commonly understood. Its occasional designation as "quasi-municipal" relates only to the nature of its debt obligations as being tax-exempt. It is also not a "power company." It will not generate or sell any electricity. Its sole function will be to transmit electricity generated by others to electric power customers. It is thus a "transmission and distribution utility" as defined in Title 35-A, not a "power company."

18. As a matter of dictionary definition, the term "quasi-governmental" means an entity "supported by the government but privately managed," the exact opposite of the Pine Tree Power Company, which is publicly governed but entirely supported by its private consumers.

19. As acknowledged by the Secretary, the initiated legislation would specifically define Pine Tree Power Company as a "consumer-owned transmission and distribution utility" along with similar entities such as the Houlton Water Company, the Madison Electric Works, and the Kennebunk Power District.

20. To the extent that it is important to convey public accountability and transparency, the following phrase "governed by an elected board" makes this clearer and more understandable than reference to the recondite term "quasi-governmental."

21. The Petition signed by more than 69,000 Maine voters in order to initiate the upcoming vote speaks in terms of "consumer owned" or "customer owned" utility, not a "quasi-governmental" entity.

22. To voters considering whether to bring the Pine Tree Power Company to life, probably the most important single question is whether the Maine taxpayers will be financially responsible for the new entity. The term "quasi-governmental" carries at least a connotation of governmental finances. The term "consumer owned transmission and distribution utility," which would apply to the Pine Tree Power Company by statutory definition, accurately identifies the consumers, not the taxpayers, as those ultimately responsible for the financial security of the utility.

23. For the foregoing reasons the term "quasi-governmental power company" proposed by the Secretary is not concise and intelligible and does not describe the subject matter of the direct initiative as simply as is possible.

COUNT I

Complaint for Review of Final Agency Action

24. Petitioners hereby incorporates by reference the allegations asserted in all paragraphs set forth above with the same effect as if set forth in full herein.

25. Pursuant to the Administrative Procedures Act, the Court has the authority to reverse or modify the decision of an agency when it determines that the agency's "decision[ ]" is "[i]n violation of constitutional or statutory provisions." 5 M.R.S. § 1107(4)(C).

26. The Decision violates Article IV, Part 3, Section 20 of the Maine Constitution, which required the Secretary to present the Ballot Question "concisely and intelligibly." Me. Const. art. IV, pt. 3, § 20.

27. The Decision violates 21 M.R.S. § 906(6), which required the Secretary to write the Ballot Question "in a clear concise and direct manner that described the subject matter of the . . . direct initiative as simply as possible." 21 M.R.S. §906(6).

28. These constitutional and statutory violations foreclose the possibility that the voters will "understand the subject matter and choice presented" by the Ballot Question. *Olson v. Secretary of State,* 1997 ME 30, ¶ 11, 689 A.2d 605.

29. As a result of the foregoing, the Court should exercise its authority under 5 M.R.S. § 1107(4)(C) to modify the Decision to ensure that the Ballot Question accords with all constitutional and statutory mandates.

WHEREFORE, Petitioners ask that this Court:

1. Find the use of the term "quasi-governmental power company" to describe the entity to be created by the initiated legislation in the Ballot Question to be not in compliance with the Constitutional and statutory requirements for the wording of ballots in citizen referenda;
2. Find that the use of that term renders the Ballot Question in violation of constitutional and statutory provisions, specifically Article IV, Part 3, Section 20 of the Maine Constitution and 21 M.R.S. § 906(6);
3. Modify the Decision by substituting the term "consumer-owned transmission and distribution utility" for "quasi-governmental power company" in the Ballot Question; and
4. Grant such other relief as the Court deems just and proper.

Dated: February 9, 2023.

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Portland, Maine 04101

Counsel for Petitioners

CONTAINS NONPUBLIC DIGITAL INFORMATION

MAINE JUDICIAL BRANCH

This summary sheet and the information it contains do not replace or supplement the filing and service of pleadings or other papers as required by the Maine Rules or by law. This form is required for the Clerk of Court to initiate or update the civil docket. The information on this summary sheet is subject to the requirements of M. R. Civ. P. 11.

I. **COUNTY OF FILING OR DISTRICT COURT JURISDICTION** *("X" the appropriate box and enter the County or location)*

☒ Superior Court County: Cumberland

☐ District Court Location (city/town): _____

II. **NATURE OF THE FILING**

☒ Initial Complaint

☐ Third-Party Complaint

☐ Cross-Claim or Counterclaim

☐ Reinstated or Reopened case

Docket No.: _____

If filing a second or subsequent Money Judgment Disclosure, give the docket number of the first disclosure.)

Initial Complaint: A complaint filed as an original proceeding. A filing fee is required.
Third-Party Complaint: An original defendant's action against a third party that was not part of the original proceeding. A filing fee is required.
Cross-Claim: An original defendant's claim against another original defendant. No additional fee is required.
Counterclaim: An original defendant's claim against an opposing party. No additional fee is required.
Reinstated or Reopened Case: Money Judgment Disclosures or post-judgment motions.

III. ☐ **REAL ESTATE OR TITLE TO REAL ESTATE IS INVOLVED**

IV. **MOST DEFINITIVE NATURE OF ACTION**

("X" in ONE box. If the case fits more than one nature of action, select the one that best describes the cause of action.)

GENERAL CIVIL

Constitutional/Civil Rights
☐ Constitutional/Civil Rights

Contract
☐ Debt Collection brought by a debt collector as defined by 32 M.R.S. § 11002 *(Contract Case Cover Sheet (CV-261) must be attached)*
☐ Other Contract *(Contract Case Cover Sheet (CV-261) must be attached)*

Declaratory/Equitable Relief
☐ Declaratory Judgment
☐ General Injunctive Relief
☐ Other Equitable Relief

Non-Personal Injury Torts
☐ Auto Negligence
☐ Libel/Defamation
☐ Other Negligence
☐ Other Non-Personal Injury Tort

Personal Injury Torts
☐ Assault/Battery
☐ Auto Negligence
☐ Domestic Tort
☐ Medical Malpractice
☐ Other Negligence
☐ Other Personal Injury Tort
☐ Product Liability
☐ Property Negligence

Statutory Actions
☐ Freedom of Access
☐ Other Statutory Action
☐ Unfair Trade Practice

Miscellaneous Civil
☐ Administrative Warrant
☐ Appointment of Receiver
☐ Arbitration Awards
☐ Common Law Habeas Corpus
☐ Drug Forfeiture
☐ Foreign Deposition
☐ Foreign Judgments
☐ HIV Testing
☐ Land Use Enforcement (80K)
☐ Minor Settlements
☐ Other Civil
☐ Other Forfeiture/Property Libel
☐ Pre-Action Discovery
☐ Prisoners Transfers
☐ Shareholders' Derivative Action

APPEALS (ADR EXEMPT)
☒ Administrative Agency (80C)
☐ Governmental Body (80B)
☐ Other Appeal

REAL ESTATE

Foreclosures
☐ Foreclosure (ADR exempt)
☐ Foreclosure (Diversion eligible)
☐ Foreclosure (Other)

Title Actions
☐ Boundary
☐ Easement
☐ Eminent Domain
☐ Quiet Title

Miscellaneous Real Estate
☐ Abandoned Road
☐ Adverse Possession
☐ Equitable Remedy
☐ Mechanics Lien
☐ Nuisance
☐ Other Real Estate
☐ Partition
☐ Trespass

CHILD PROTECTIVE CUSTODY
☐ Non-DHHS Protective Custody

SPECIAL ACTIONS
☐ Money Judgment Disclosure

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MAINE JUDICIAL BRANCH

V. M.R. Civ. P. 16B ALTERNATIVE DISPUTE RESOLUTION (ADR)

☒ I certify that pursuant to M.R. Civ. P. 16B(b), this case is exempt from a required ADR process because *("X" one box below):*

- ☒ It falls within an exemption listed above (it is an appeal or an action for non-payment of a note in a secured transaction).
- ☐ The plaintiff or defendant is incarcerated in a local, state, or federal facility.
- ☐ The parties have participated in a statutory pre-litigation screening panel process with (*name of panel chair*) _____ that concluded on (*date of panel finding - mm/dd/yyyy*) _____.
- ☐ The parties have participated in a formal ADR process with (*name of neutral*) _____ on (*date – mm/dd/yyyy*) _____.
- ☐ The plaintiff's likely damages will not exceed $30,000, and the plaintiff requests an exemption.
- ☐ The action does not include ADR pursuant to M.R. Civ. P. 16(a)(1).
- ☐ There is other good cause for an exemption and the plaintiff has filed a motion for exemption.

VI. PARTY AND ATTORNEY CONTACT INFORMATION

If you need additional space, list additional parties on an attachment and note "see attachment" in the appropriate section.

Please note: If a party is a government agency, use the full agency name or the standard abbreviation. If the party is an official within a government agency, identify the agency first and then the official, giving both name and title.

(a) PLAINTIFF(S)

("X" the box below to indicate the party type associated with the filing)

☒ Plaintiff(s)
☐ Third-Party Plaintiff(s)
☐ Counterclaim Plaintiff(s)
☐ Cross-Claim Plaintiff(s)

Is the plaintiff a prisoner in a local, state, or federal facility? ☐ Yes ☐ No

Name (*first, middle initial, last*): see attached
Mailing address (*include county*): _____
_____
Telephone: _____
Email: _____

Name (*first, middle initial, last*): _____
Mailing address (*include county*): _____
_____
Telephone: _____
Email: _____

(b) ATTORNEY(S) FOR PLAINTIFF(S)

If there are multiple attorneys, indicate the lead attorney. *If all counsel do not represent ALL plaintiffs, specify which plaintiff(s) the listed attorney(s) represents.*

Name and bar number: Peter L. Murray, Esq., Bar No. 1135
Firm name: Murray Plumb & Murray
Mailing Address: P.O. Box 9785
Portland, ME 04104-5085
Telephone: (207) 523-8220
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Attachment to Civil Summary Sheet

VI.(a)

Wayne R. Jortner
11 Fox Hill Road
Freeport, ME 04032

Richard A. Bennett
75 Bennett Lane
Oxford, ME 04270

John L. Clark
Bangor Road
Linneus, ME 04730

Nicole Grohoski
151 Bangor Road
Elsworth, ME 04605

MAINE JUDICIAL BRANCH

Name and bar number: Sean R. Turley, Esq., Bar No. 6351
Firm name: Murray Plumb & Murray
Mailing Address: P.O. Box 9785
Portland, ME 04104-5085
Telephone: (207) 523-8202
Email: sturley@mpmlaw.com

(c) DEFENDANT(S)

("X" the box below to indicate the party type associated with the filing)

☒ Defendant(s)
☐ Third-Party Defendant(s)
☐ Counterclaim Defendant(s)
☐ Cross-Claim Defendant(s)

Is the defendant a prisoner in a local, state, or federal facility? ☐ Yes ☐ No

Name (*first, middle initial, last*): Shenna Bellows, in her official capacity as Secretary of State of Maine
Mailing address (*include county*): 148 State House Station
Augusta, ME 04333
Telephone:
Email:

Name (*first, middle initial, last*):
Mailing address (*include county*):
Telephone:
Email:

(d) ATTORNEY(S) FOR DEFENDANT(S)

If there are multiple attorneys, indicate the lead attorney. *If all counsel do not represent ALL defendants, specify which defendant(s) the listed attorney(s) represents.*

Name and bar number: Paul Suitter, Esq., Bar No. 5736
Firm name: Office of the Attorney General
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Augusta, ME 04333
Telephone: (207) 626-8800
Email: paul.suitter@maine.gov

Name and bar number: Jonathan Bolton, Esq., Bar No. 4597
Firm name: Office of the Attorney General
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Email: jonathan.bolton@maine.gov

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(e) PARTIES IN INTEREST

Name (*first, middle initial, last*): _____
Mailing address (*include county*): _____
_____
Telephone: _____
Email: _____

Name (*first, middle initial, last*): _____
Mailing address (*include county*): _____
_____
Telephone: _____
Email: _____

(f) ATTORNEY(S)

If there are multiple attorneys, indicate the lead attorney. *If all counsel do not represent ALL parties in interest, specify which parties in interest the listed attorney(s) represents.*

Name and bar number: _____
Firm name: _____
Mailing Address: _____
_____
Telephone: _____
Email: _____

Name and bar number: _____
Firm name: _____
Mailing Address: _____
_____
Telephone: _____
Email: _____

VII. RELATED CASE(S) IF ANY

Case name: _____
Docket Number: _____
Assigned Judge/Justice: _____

Date (*mm/dd/yyyy*): 02/09/2023

▶ _____
Signature of Plaintiff or Lead Attorney of Record

Peter L. Murray, Esq. Bar No. 1135
Printed Name of Plaintiff or Attorney

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